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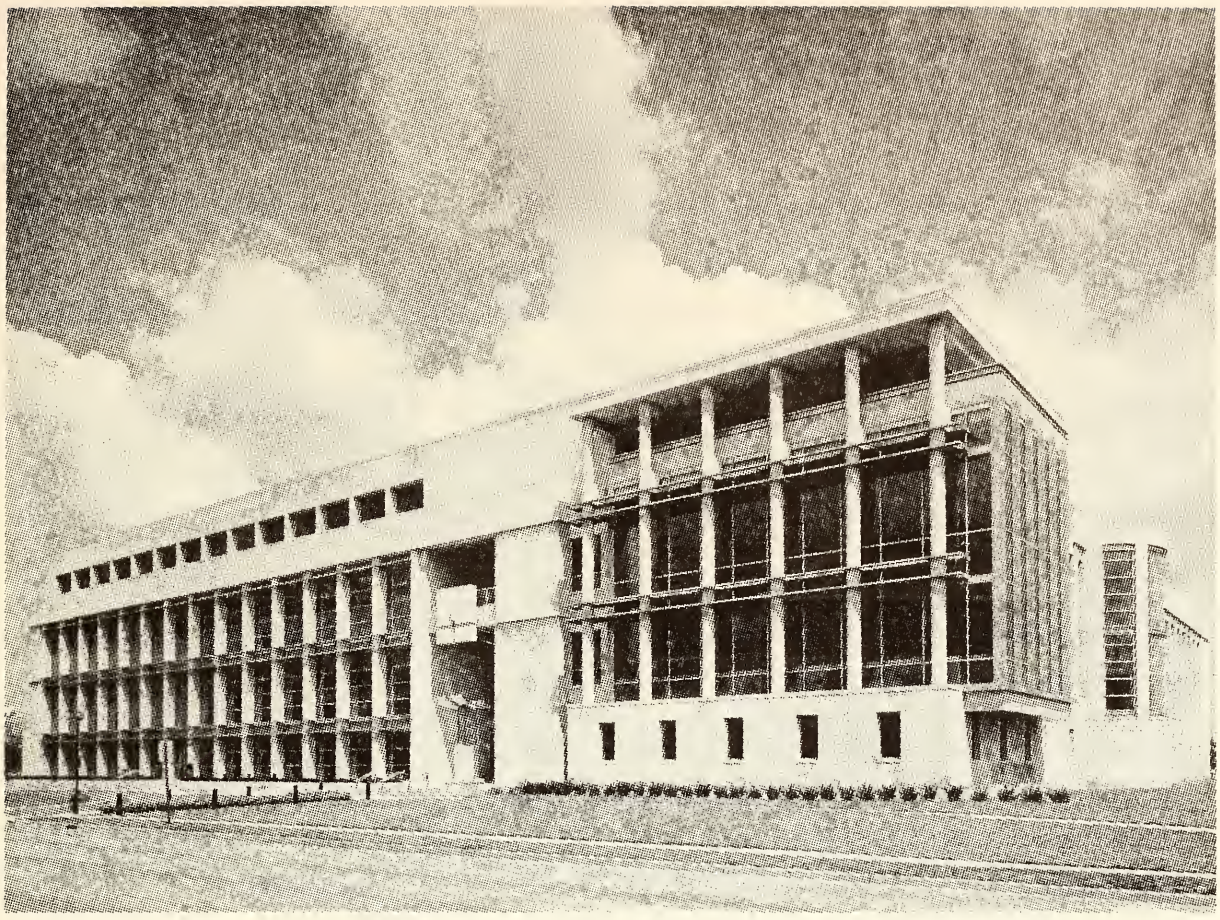

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Indiana Law Review

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IMPEDIMENTS TO REASONABLE TORT REFORM: LESSONS FROM THE ADOPTION OF COMPARATIVE NEGLIGENCE

ARTHUR BEST*

INTRODUCTION

In an "avalanche"[1] of tort reform a generation ago, the number of states applying the contributory negligence doctrine[2] fell from forty-four to seven. States replaced that doctrine with either the "pure" or "modified" form of comparative negligence. While almost all scholars favored the pure form that treats negligent plaintiffs and negligent defendants the same way, the majority of jurisdictions chose the modified form that varies the effect of a share of responsibility depending on whether it is assigned to a plaintiff or to a defendant.[3]

The pure form of comparative negligence makes any party's financial consequence from involvement in a negligently-caused injury directly proportional to that party's share of responsibility, whether that consequence is the amount of damages a defendant must pay or the amount of loss a plaintiff must bear without compensation.[4] In the modified system, plaintiffs and

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* Professor of Law, University of Denver Sturm College of Law. Thanks to Tom Baker and Michael Green for encouragement and suggestions, to my colleague Eli Wald for very helpful reactions to an early draft, and to Rachel Best for valuable ideas from the perspective of a sociology graduate student. Thanks also to Daniel Bristol and Geoffrey Klingsporn, students at the Sturm College of Law, for painstaking and imaginative assistance. Errors, of course, are mine. This Article was supported by a research grant from the Sturm College of Law.

1. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7, reporters' notes, cmt. a (2000) ("The modern American adoption of comparative responsibility began in Arkansas in 1955. Arkansas first adopted a pure comparative-negligence statute and then amended it to embody modified comparative negligence. Maine followed suit with a modified-comparative-negligence statute in 1965. In the 1970s, the avalanche began, leading to the nearly uniform adoption of comparative principles that exists today." (citations omitted)). This Article studies the period of 1969 through 1984. See Appendix for references for each state.

2. The contributory negligence doctrine bars recovery when a plaintiff is negligent in any way that contributes to the plaintiff's harm. *See* BLACK'S LAW DICTIONARY 353 (8th ed. 2004).

3. *See* text accompanying *infra* notes 22-29.

4. In the "pure form" of comparative negligence, a plaintiff is entitled to recovery unless the plaintiff's share of responsibility for his or her injuries is 100%. If the plaintiff's share is 99% or less, the plaintiff is entitled to recovery that is reduced to reflect the plaintiff's percentage of

defendants receive different treatment.[5] A plaintiff who is more than half at fault in causing his or her injury bears *all* of the cost, but a defendant who is more than half at fault in causing an injury bears only *some* of the cost of that injury.[6] From the defendant's point of view, this is a beneficial "heads I win, tails you lose" discrepancy. If a jury concludes that the plaintiff was more than half to blame, the *defendant wins* and pays nothing. However, if a jury concludes that the plaintiff was less than half to blame, the defendant pays only part of the cost of the injury and the *plaintiff loses* (partially) by bearing some of the cost of the injury.

This Article examines the ascendancy of the modified form of comparative negligence in an effort to understand factors that can influence how we define, debate, and adopt tort reform measures. Traditional framing choices, reformers' rhetorical framing choices, habituation to injustice, and institutional differences between courts and legislatures all may have influenced the pattern of change. Identifying these factors may offer lessons for advocacy or analysis of current tort reform proposals.

I. TRADITIONAL TREATMENT OF CASES INVOLVING A PLAINTIFF'S NEGLIGENCE

Influenced by the 1809 English case, *Butterfield v. Forrester*,[7] the contributory negligence doctrine became the dominant American treatment of cases in which a plaintiff's injuries were caused by negligence of both a plaintiff and a defendant. For those cases, the plaintiff was not entitled to recover any damages.[8] This doctrine completely precluded a plaintiff's recovery in any case where the plaintiff and defendant were both negligent.

De jure and *de facto* responses to the "all or nothing" aspect of the doctrine were plentiful. Courts developed pro-plaintiff standards of care for particularly appealing plaintiffs whose conduct was likely to fall below the degree of care

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responsibility. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a (2000).

5. There are two forms of "modified" comparative negligence, the "49% form" and the "50% form." They vary only in treatment of a plaintiff whose share of responsibility is exactly 50%. In the 49% form, a plaintiff whose share of responsibility is 49% or less recovers damages reduced proportionally to reflect that share, but a plaintiff whose share of responsibility is 50% or more recovers nothing. In the 50% form, a plaintiff whose share of responsibility is 50% or less recovers damages reduced proportionally to reflect that share, but a plaintiff whose share of responsibility is 51% or more recovers nothing. *See id.*

6. The examples in this Article assume a hypothetical two-party case in which one actor suffers an injury and a jury finds that each actor had some share of responsibility for the injury. The differences between the 49% and 50% forms of modified comparative negligence do not affect the analysis in this Article; for that reason, its examples use percentages of responsibility that are treated the same way in both forms of modified comparative negligence.

7. (1809) 103 Eng. Rep. 926 (K.B.).

8. *See generally* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

required by the reasonable person standard. In particular, the child's standard of care exemplifies this response.[9] The "last clear chance doctrine" was another device that facilitated recovery by plaintiffs whose conduct was unreasonable.[10] The "rescue doctrine"[11] and various "sudden emergency doctrines"[12] also offered jurors the opportunity to treat conduct by plaintiffs as reasonable that they might have characterized as contributorily negligent in the absence of those elaborations on the standard of reasonable care. In addition to these doctrines that sometimes limited the impact of the contributory negligence doctrine, the legal community widely believed that some juries ignored their instructions and rendered verdicts for plaintiffs even though there was substantial support for a finding of contributory negligence.[13]

While the contributory negligence doctrine continued to be the predominant approach to cases with negligent plaintiffs until the end of the twentieth century, several statutory developments limited its scope and a small number of states pioneered the shift from contributory to comparative negligence. The Federal Employers Liability Act of 1908 applied pure comparative principles in actions by employees against railroads or other common carriers.[14] The Jones Act of 1970 applied pure comparative negligence in suits involving maritime workers and their employers.[15] Workers' Compensation statutes allowed administrative redress for injured workers regardless of their possible negligence. Mississippi adopted pure comparative negligence by statute in 1910.[16] In a combination of legislative and judicial actions, Georgia employed modified comparative negligence at about the same time.[17] The Wisconsin legislature adopted the modified form of comparative negligence in 1931.[18]

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9. *See, e.g.*, Roth v. Union Depot Co., 43 P. 641, 647 (Wash. 1896).

10. *See, e.g.*, Davies v. Mann, 152 Eng. Rep. 588, 589 (Exch. of Pleas 1842).

11. *See, e.g.*, Wagner v. Int'l Ry. Co., 133 N.E. 437, 438 (N.Y. 1921).

12. *See, e.g.*, Lyons v. Midnight Sun Transp. Servs., Inc., 928 P.2d 1202, 1205 (Alaska 1996).

13. Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 705 n.78 ("[T]his tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries . . . ." (quoting Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934))).

14. 45 U.S.C. §§ 51-53 (2000).

15. 46 U.S.C. § 688 (2000); *see also* Death on the High Seas Act of 1920, 46 U.S.C. §§ 761-768 (2000).

16. MISS. CODE ANN. § 11-7-15 (2006).

17. The Georgia legislature first abandoned contributory negligence in an 1863 statute that stated, "the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." GA. CODE ANN. § 51-11-7 (2006). The same year, the Georgia legislature specifically adopted comparative negligence for railroad cases. *Id.* § 46-8-291. The Georgia judiciary gradually combined these statutes and developed a general system of modified comparative negligence. *See, e.g.*, Elk Cotton Mills v. Grant, 79 S.E. 836, 838 (Ga. 1913).

18. WIS. STAT. § 895.045 (2005).

II. CRITICISMS OF CONTRIBUTORY NEGLIGENCE

Courts and scholars criticized the doctrine of contributory negligence on a number of grounds. The ameliorative doctrines were considered too difficult to predict and too difficult to justify.[19] Commentators noted that strongly deterring plaintiffs who might act unreasonably while eliminating any deterrence of negligent defendants was extremely difficult to justify.[20]

The contributory negligence system required jurors to describe the conduct of any party involved in an injury as either negligent or not negligent. Some suggested that these two categories failed to capture a more realistic description of the causes of accidental injuries because it is often true that more than one party is partly to blame for an injury.[21]

The belief that jurors intentionally reached the conclusion that a plaintiff was free from contributory negligence even when they believed that the plaintiff had been negligent was treated as a fault of the contributory negligence system. That system could be criticized as forcing citizens into unethical conduct as jurors. Also, if jurors misstated their conclusions about plaintiffs' fault but then adjusted amounts of damages to reflect fault, that state of affairs would be contrary to the general rule of law that requires the legal system, not individual juries, to develop and state the governing principles for treating various types of cases.

III. SCHOLARLY EVALUATIONS OF COMPARATIVE NEGLIGENCE

In scholarly writings that illuminated the shortcomings of the contributory negligence doctrine and recommended adoption or expansion of comparative negligence principles, leading figures in tort law either advocated the pure system or took it for granted that comparative negligence was equivalent to what became known as the pure system. In 1953, William L. Prosser published "Comparative Negligence."[22] In that same year, Fleming James, Jr. published "Contributory Negligence."[23] Each of these articles surveyed the injustices inherent in the contributory negligence system and evaluated instances in which comparative negligence was used. Prosser criticized the modified form used in Wisconsin, stating: "It appears impossible to justify the rule on any basis except one of pure political compromise. It is difficult . . . to escape the conclusion that at the cost

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19. *See, e.g.*, Laurence W. DeMuth, *Derogation of the Common Law Rule of Contributory Negligence*, 7 ROCKY MTN. L. REV. 161, 186-87 (1935); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 471-74 (1953) (demonstrating the complex and sometimes unpredictable operation of the last clear chance doctrine).

20. *See* Guido Calabresi, *Optimal Deterrence and Accidents: To Fleming James, Jr.*, 84 YALE L.J. 656, 662-63 (1975); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 885-92 (1981).

21. *See* Charles O. Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1, 1-2 (1936) (discussing "the inevitability of accidents involving several parties, all or more than one of whom are equally 'at fault'").

22. Prosser, *supra* note 19, at 465.

23. James, *supra* note 13, at 691.

of many appeals they have succeeded merely in denying apportionment in many cases where it should have been made."[24] Explicitly communicating his preference for the pure form, Prosser included a draft statute in his article adopting the pure form of comparative negligence.[25] James concluded "both modern policy and the logic of the fault principle point to a rule that plaintiff's fault—if it is to be counted at all—will diminish rather than defeat his recovery."[26] Other studies reached the same conclusion.[27]

When the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Comparative Fault Act, it chose the pure form of comparative negligence.[28] The Act's Prefatory Note offered a summary of the on-going movement for change:

> The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. . . . This Uniform Act . . . addresses the problems and provides what are regarded as the best solutions for them.[29]

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24. Prosser, *supra* note 19, at 494.

25. *Id.* at 508.

26. James, *supra* note 13, at 731.

27. *See* Gregory, *supra* note 21, at 6 (stating that the pure system of comparative negligence as applied in Mississippi "saved its courts an immense amount of cumbersome administrative and legalistic detail and at the same time penalized the too negligent plaintiff by providing for a substantial decrease in his recoverable damages"); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence* 17 CORNELL L.Q. 333, 341 (1932) (describing the "equal division principle" in admiralty law as a "stepping-stone" to comparative negligence which would avoid the equal division principle's risk of imposing "more harm to one of the wrong-doers than he deserves"); A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence, Part II*, 17 CORNELL L.Q. 604, 642 (1932) (describing Mississippi's pure form of comparative negligence as approaching "more closely the ideals of theoretical and practical justice than the harsh and inflexible rule of contributory negligence"); *see also* Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950) (comparing the pure system of comparative negligence with the modified approaches in other states and endorsing the pure form); *see generally* Francis S. Philbrick, *Loss Apportionment in Negligence Cases Part II: Some Proposals for Reform in Pennsylvania*, 99 U. PA. L. REV. 766 (1951) (endorsing the pure form of comparative negligence).

28. UNIF. COMPARATIVE FAULT ACT § 1(a), 12 U.L.A. 127 (1996). The Uniform Act was adopted in 1977, near the mid-point of the period of reform studied in this Article. As its Preface states, the Act reflected long years of work. It therefore may reflect the consensus of scholarly opinion that could have influenced the judicial and legislative actions that occurred during the years of study that produced the Act.

29. *Id.* at 123-24.

IV. Details of the Comparative Negligence Revolution

In the period of this study, the majority rule in the United States changed from treating a plaintiff's negligence as a complete bar to recovery to treating a plaintiff's negligence as a factor that either reduced or barred recovery.[30] From 1969 through 1984, thirty-seven states abolished their contributory negligence doctrines and adopted comparative negligence.[31] Table I depicts this revolution, showing which states adopted each form of comparative negligence and whether the legislature or judiciary adopted the change. The modified form was adopted in twenty-three of the thirty-seven states that acted during the period studied.[32] In states where legislatures replaced the contributory negligence system with a comparative system, twenty-two out of twenty-six chose the modified form.[33] In states where courts made the switch, one out of eleven chose that form.[34]

Table I

STATE ADOPTIONS OF COMPARATIVE NEGLIGENCE: 1969-1984
(showing choice of form by court or legislature)

	COURT	LEGISLATURE
PURE	AR CA FL IA IL KY MI MO NM RI	AZ LA NY WA
MODIFIED	WV	CO CT DE HI ID IN KS MA MN MT NH NJ NV ND OH OK OR PA TX UT VT WY

V. Modified Comparative Negligence and the "Fairness" Criterion

Courts and legislatures both referred to concepts such as fairness and justice in their adoptions of comparative negligence. For example, the Alaska Supreme Court stated: "We are persuaded that the contributory negligence rule yields

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30. *See* Appendix *infra* pp. 17-22.

31. *See* Appendix *infra* pp. 17-22.

32. *See* Table I.

33. *See* Table I.

34. *See* Table I. The fact that legislatures were more likely than courts to adopt the modified form is statistically significant. A student's two-tailed t-test yielded a p-factor of less than 0.001.

unfair results which can no longer be justified."[35] Legislators also frequently supported their choices with references to fairness. Illustratively, a description of the legislative process in Ohio referred to "the principal argument espoused in favor of the modified form, *fairness* and equity."[36] The central defect of the contributory negligence system is its unequal treatment of plaintiffs and defendants. That is, a negligent plaintiff is always required to bear the full cost of an injury partly caused by the plaintiff, although a negligent defendant is never required to bear any of the cost of an injury partly caused by the defendant. The pure system of comparative negligence addresses that flaw. The modified form does not, yet it was the overwhelming choice of legislatures that were concerned with "fairness." This section demonstrates that adopting the modified form does not further the fairness objective and thus suggests that it would be worthwhile to attempt to identify other explanations for the typical legislative preference for the modified form.

Ordinarily our legal system gives identical treatment to identical actors. The pure system of comparative negligence does just that. Table II shows shares of responsibility that a jury might assign to a plaintiff or a defendant, and it also shows for each share the portion of the costs of the injury that the doctrine will require the party to bear. The Table shows that pure comparative negligence treats a plaintiff who is more than 50% responsible for an injury exactly the same

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35. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975) (emphasis added); *see also* Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) ("[L]ogic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery . . . ."); Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973) ("Whatever may have been the historical justification for [the contributory negligence doctrine], today it is almost universally regarded as unjust and inequitable. . . .").

36. Jeffrey A. Hennemuth, *Ohio's Last Word on Comparative Negligence?—Revised Code Section 2315.19*, 9 OHIO N.U. L. REV. 31, 48 (1982) (emphasis added). The experience in other states may be similar. For example, the legislative process in Arkansas is the subject of a number of articles, probably because it was one of the first states to reject contributory negligence. *See* Maurice Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 90 (1959); Billy J. Thomson, Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 ARK. L. REV. 692, 692 (1969). The state adopted a pure comparative negligence regime in 1955, but replaced it with the modified form two years later. A writer at the time explained, "The primary purpose of the new act seems to be to eliminate [a] situation, felt by many attorneys to be *unfair*." Dan B. Dobbs, *Legislative Notes*, 11 ARK. L. REV. 375, 392 (1957) (emphasis added). A New Hampshire legislator described the "fundamental" legislative motivation as "a deep conviction that the contributory negligence rule was *so basically unfair* and illogical that it should have no further place in our law." David L. Nixon, *The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17, 18 (1969) (emphasis added). The sponsor of a modified comparative negligence statute adopted in Indiana wrote: "It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly." Nelson J. Becker, *Indiana's Comparative Fault Law: A Legislator's View*, 17 IND. L. REV. 881, 881 (1984).

way it treats a defendant who is more than 50% responsible for an injury. Also, the pure system treats a plaintiff who is less than 50% responsible for an injury exactly the same way it treats a defendant who is less than 50% responsible for an injury.

Table II

Pure Comparative Negligence
(examples for plaintiffs and defendants in separate cases)

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	Some	Some	Some	Some

In contrast to the pure comparative negligence treatment shown in Table II, modified comparative negligence treats a plaintiff's negligence as a complete bar to recovery in any case where the plaintiff's negligence exceeds 50%.[37] This leaves the plaintiff bearing all of the cost of the injury. However, the modified system applies a different consequence to a defendant in a case where a defendant's negligence exceeds 50%. That defendant will bear only a portion of the cost of the injury. Table III illustrates how modified comparative negligence applies different treatment to parties whose shares of negligence are the same based on the party's status as a plaintiff or a defendant.

37. Both forms of modified comparative negligence produce this result (the "49% form" also provides this result in any case where the plaintiff's negligence is equal to 50%).

Table III

Modified Comparative Negligence
(examples for plaintiffs and defendants in separate cases)

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	Some	None	All	Some

Table III shows the serious logical flaw of modified comparative negligence. The system applies the concept of fault in different ways to plaintiffs and defendants so that the same amount of fault has a graver consequence for a plaintiff than for a defendant.[38] For example, assume an accident in which an inattentive cyclist suffers $10,000 in damages because of a collision with a car driven by an inattentive driver. If the cyclist sues the driver and the jury finds the cyclist more than 50% negligent, the cyclist will bear the full cost of the $10,000 injury. In contrast, if the jury finds the driver more than 50% negligent, the driver will bear only a *fraction* of the $10,000 because the modified system will reduce the cyclist's recovery to reflect the cyclist's share of responsibility. Thus, if the jury assigned 20% of responsibility to the cyclist, the cyclist would recover 80% of the total damages and the driver would bear $8,000 of the cost of the injury.

Based on the theory that plaintiffs should be deterred from harming themselves, it might be argued that generally a plaintiff's conduct that causes the plaintiff harm is worse than conduct by a defendant that causes a plaintiff harm. There are two objections to this suggestion. First, all negligent conduct ought to be deterred by tort principles. Second, if it were fruitful to characterize differences between conduct by a plaintiff that imperils a plaintiff personally and conduct by a defendant that imperils a stranger, a strong argument might be made that it is worse to endanger others than it is to endanger oneself.[39]

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38. It might be helpful to recall here that tort law can never undo an injury. Tort law can only shift the economic consequences of an injury and thus determines what portion of the cost of an injury will be borne by each actor who participated in causing it.

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> [I]n cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not.

Implicit in the description provided in Table III is another controversial aspect of modified comparative negligence. Besides failing to treat plaintiffs and defendants who have identical shares of responsibility (in separate cases) the same way, the system applies drastically different treatment to some plaintiffs whose shares of responsibility are almost identical. For example, a plaintiff who is 49% to blame is entitled to receive damages but a plaintiff who is 51% to blame recovers nothing. Rationalizing this result as a matter of causation makes little sense, since each of these plaintiffs has causal responsibility for his or her harm and each of them has also been a victim of negligent conduct caused by a defendant.

Could a modified comparative negligence system give identical treatment to identical actors as the pure system does? That result is possible, although no current modified system achieves it. Table IV illustrates a proposed system that no state currently uses. It might be called "symmetrical" or "balanced" modified comparative negligence. Its crucial aspect is the equal treatment of parties who are more than 50% or who are less than 50% responsible for any injury, regardless of whether they are plaintiffs or defendants. A plaintiff who is less than 50% responsible bears none of the cost of injury, and a defendant who is less then 50% responsible bears none of the cost of injury. Similarly, a plaintiff who is more than 50% responsible bears all of the cost of injury, and a defendant who is more then 50% responsible bears all of the cost of injury.

Table IV

"Symmetrical" or "Balanced" Modified Comparative Negligence (examples for plaintiffs and defendants in separate cases)

Share of Responsibility Assigned to the Party by the Jury	Plaintiff less than 50%	Defendant less than 50%	Plaintiff more than 50%	Defendant more than 50%
Share of Injury Cost Borne by the Party	None	None	All	All

If "fairness" in the minds of legislators really required making an actor whose share of responsibility is greater than 50% bear the entire cost of an injury, the symmetrical system shown in Table IV is the system they should have adopted. It links any party who was more than 50% responsible for an injury to full financial responsibility for that injury. In contrast, the widely-adopted modified comparative negligence systems ignore this possibility and impose that

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Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 205 (Ill. 1983).

link only on plaintiffs. The legislatures' stated rationale for adopting the modified form is not consistent with the version of comparative negligence that they typically widely adopted. Replacing the contributory negligence regime with modified comparative negligence must have satisfied some concerns other than fairness, assuming fairness can be defined as equal treatment for identical actors. The following sections of this Article seek to understand the factors that might have influenced jurisdictions to choose a system that seems to incorporate severe flaws of logic and therefore leading to injustice.

VI. THE PATH FROM FAIRNESS TO COMPROMISE

Modified comparative negligence fails tests of fairness and logic. Yet it was the clear preference of legislatures that sought to eliminate the strongly pro-defendant doctrine of contributory negligence. Lobbying by insurance interests apparently played a significant role in the legislative process,[40] with the slim historical record suggesting that legislatures were pulled strongly towards what could be characterized as a compromise position.[41]

Available descriptions of the legislative history of comparative negligence in Ohio show the influence of the insurance industry.[42] One account described the law as "the culmination of long and arduous efforts at compromise in the legislature . . . follow[ing] more than seven years of fierce opposition by insurance companies and the insurance lobby."[43] The state bar, a trial lawyers group, and some members of the judiciary supported the pure form while opposition to all comparative negligence came from "the insurance industry, defense lawyers, and others (railroads, for example) who were satisfied to maintain the *status quo*."[44] By 1980, comparative negligence had become a majority position in the country, but Ohio still applied contributory negligence.[45] "[I]n order to get some form of comparative negligence on the statute book" proponents of comparative fault agreed to support a proposal for the modified

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40. John G. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239, 239 (1976); *see also* VICTOR E. SCHWARTZ & EVELYN F. ROWE, COMPARATIVE NEGLIGENCE 14 (4th ed. 2002); Hennemuth, *supra* note 36, at 45-46; Carol Isackson, *Pure Comparative Negligence in Illinois*, 58 CHI.-KENT L. REV. 599, 605-06 (1981).

41. Legislatures considering reforms of the contributory negligence system naturally considered the problem in the context of experience under that system. That is, they may have seen their task as developing improvements in a system that was routinely unfair to large numbers of plaintiffs. Against that background, a system that might be unfair only to small numbers of plaintiffs might have seemed to be sufficient reform. The plaintiffs who were left behind by the partial reform could have no complaint that they were disadvantaged, since their position remained exactly the same as it had been prior to the reform.

42. Hennemuth, *supra* note 36, at 45-46; *see* Paul Courtney & Brian Dovi, Note, *S.B. 165: Comparative Negligence in Ohio*, 7 U. DAYTON L. REV. 257 (1981); *see also* Charles E. Brant, *A Practitioner's Guide to Comparative Negligence in Ohio*, 41 OHIO ST. L.J. 585 (1980).

43. Courtney & Dovi, *supra* note 42, at 257.

44. Hennemuth, *supra* note 36, at 46; Courtney & Dovi, *supra* note 42, at 263.

45. Courtney & Dovi, *supra* note 42, at 264.

form.[46]

Information is also available for Indiana's process of adopting comparative negligence. There, adoption of modified comparative negligence was the result of compromise between those who supported the pure form and advocates for insurance interests who opposed it.[47] One commentator explained: "Although statutory adoption of apportionment of liability may have been inevitable, the precise system accepted by the General Assembly was not. . . . [P]olitical compromises necessary to enact some form . . . militated against whatever theoretical chances a pure system may have had."[48]

Adopting the modified form may have seemed like a sensible compromise to legislatures because of traditional framing of tort issues in general and certain specific framing choices by scholarly advocates of the pure form. The analysis of most tort problems asks whether plaintiffs may recover rather than asking what share of the cost of injury anyone should bear, regardless of whether that person is identified as a plaintiff or defendant. Also, scholarly proponents of comparative negligence supported their arguments with extreme examples. Framing the issue in these ways may have made acceptance of partial solutions seem attractive. For the question "Can a plaintiff recover?" the above-proposed modified form supplies a "yes" answer in many of the cases where the traditional contributory negligence system says "no." Furthermore, the above-proposed modified form resolves the injustices illustrated by the extreme examples given above.

When legislators rejected the pure form in favor of the modified form, they failed to see this compromise as a rejection of logic. The perceived legitimacy of modified comparative negligence as a compromise position may have been strengthened by the tradition in tort law of discussing most issues (including treatment of a plaintiff's negligence) in terms of a plaintiff's eligibility to recover damages. This pattern inevitably invites a logical error. Only a plaintiff can recover damages. Therefore, any rule expressed in terms of recovery of damages will be insulated from the question of how it would apply to defendants because defendants never recover damages.

The error in analysis becomes obvious by restating a central precept of modified comparative negligence in neutral terminology. A conventional statement of the modified form's main theme is that a plaintiff who is more 50% at fault for an injury should recover no damages. This position reflects the belief that an actor whose conduct is "bad" to that degree ought not to be assisted by the legal system. Characterized more generally, the idea that one whose conduct caused more than half of an injury *should recover no damages* is equivalent to

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46. Hennemuth, *supra* note 36, at 47.

47. Edgar W. Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863 (1984); *see also* Becker, *supra* note 36, at 881-82. *See generally* Symposium, *Indiana's Comparative Fault Act*, 17 IND. L. REV. 687 (1984) (containing the cited articles and additional articles).

48. Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 688 (1984).

the idea that a party who is more than half at fault for an injury *should bear all the cost* of that injury. The difference in these two statements is the switch from the terminology of recovering damages to the terminology of bearing costs. One formulation refers to "recover no damages" and the other refers to "bear all the cost." The language choice is crucial because it exposes the imbalance in the modified comparative negligence approach to the question of what loss should be shifted when a party is more than 50% negligent.

If legislators who were attracted to the idea that "bad" plaintiffs (those whose responsibility is greater than 50%) should recover nothing had understood that this is equivalent to making those plaintiffs bear all of the cost of their injuries, perhaps the legislators would have realized that "bad" defendants also could be made to bear all of the costs of the injuries caused by their "bad" conduct. This might have led legislators to adopt the kind of balanced or symmetrical modified comparative negligence described above or to choose the pure form. It certainly could have made it more difficult for legislators to embrace the typical modified system as almost all of them did.

Another framing process used by legislators involved the selection of hypothetical examples for highlighting the flaws of the contributory negligence system. When scholars described the consequences of the contributory negligence system, they almost always used the illustration of a slightly-to-blame plaintiff who the doctrine completely barred from recovery.[49] References to that specific category of cases appear even where the author's argument supported reform of the contributory negligence system that would have benefited all plaintiffs, not just "good" plaintiffs whose share of responsibility was small.[50] These rhetorical choices could lead to an over-estimation of the power of modified comparative negligence to remedy the shortcomings of contributory negligence. The extreme cases are all situations in which the modified form will provide a solution, even though the modified form fails to solve the problems of the entire class of negligent plaintiffs—the class for which the scholars intended to advocate redress.[51]

An early and frequently cited article on comparative negligence put it this way: "The plaintiff who has thus contributed, no matter how *slightly*, to his own injury may not recover for such injury, regardless how negligent the other party may have been."[52] In his article "Contributory Negligence," William Prosser described contributory negligence as "a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and *quite possibly much less at fault* than the defendant who goes scot free."[53]

The Prosser treatise also provided a similar description of contributory

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49. *See* WILLIAM PROSSER, LAW OF TORTS 433 (4th ed. 1971); Turk, *supra* note 27, at 199.

50. *See* Prosser, *supra* note 19, at 469; Turk, *supra* note 27, at 199.

51. *See* FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 22.3, at 1207 (1956).

52. Turk, *supra* note 27, at 199 (footnote omitted) (emphasis added).

53. Prosser, *supra* note 19, at 469 (emphasis added).

negligence:

> The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively *slight*, and the defendant's more extreme . . . .[54]

Further, the Harper and James treatise states:

> [T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the *slight* fault of his victim.[55]

Judicial opinions in the period of this study also illustrate a preoccupation with the special case of the nearly-perfect plaintiff. The Florida Supreme Court wrote: "The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only *slightly* responsible, and is thereby denied any damages, is readily apparent."[56] The New Mexico Supreme Court wrote: "The predominant argument for its abandonment rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how *trifling* plaintiff's negligence might be."[57] The West Virginia Supreme Court explained: "[O]ur system of jurisprudence, while based on concepts of justice and fair play, contains an anomaly in which the *slightest* negligence of a plaintiff precludes any recovery and thereby excuses the defendant from the consequences of all of his negligence, however great it may be."[58]

The California Supreme Court characterized the doctrine of contributory negligence as a system that "bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause *in any degree* to the harm suffered by him."[59] Related to the conventional use of extreme examples was the almost universal use of one particular word to describe contributory negligence—"harsh."[60] However, it wasn't specified whether the system was

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54. PROSSER, *supra* note 49, at 433 (emphasis added).

55. HARPER & JAMES, *supra* note 51, at 1207 (emphasis added).

56. Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (emphasis added).

57. Scott v. Rizzo, 634 P.2d 1234, 1241 (N.M. 1981) (emphasis added).

58. Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882 (W. Va. 1979) (emphasis added).

59. Li v. Yellow Cab Co., 532 P.2d 1226, 1229 (Cal. 1975) (emphasis added).

60. Hundreds of judicial opinions use that word to describe the doctrine or its consequences. *See, e.g.*, Lyons v. Midnight Sun Transp. Servs., 928 P.2d 1202, 1205 (Alaska 1996) ("The sudden

harsh towards *all* plaintiffs or harsh only to plaintiffs whose conduct was nearly blameless.[61]

There is evidence that state legislatures were influenced by the power of these extreme examples. When the Arkansas legislature adopted modified comparative negligence, a contemporary account stated: "Under the 1955 Act, the plaintiff might be 90% negligent and still recover a net judgment against a defendant. . . . The primary purpose of the new act seems to be to eliminate this situation, felt by many attorneys to be unfair."[62] Similarly, the sponsor of modified comparative fault legislation in Indiana wrote: "It is highly unlikely that a pure form of comparative fault, which allows recovery for a ninety-nine percent-fault plaintiff, would have been regarded as fair by the members of the Indiana General Assembly."[63]

However, these legislative framings alone did not cause adoption of the modified form. Courts also typically adopted the pure system even though judges were exposed to the same traditional style of describing torts cases and the same extreme examples in the scholarly literature. It is likely, however, that the framings decreased the political cost of preferring the modified form. Legislators could accede to the insurance industry position without obviously contradicting the predominant scholarly position. The extreme examples frame could lead legislators to believe that adopting modified comparative negligence was a comprehensive response to the deficiencies of the contributory negligence doctrine.

CONCLUSION

This Article suggests that legislatures typically rejected the form of comparative negligence that was favored by scholars and adopted almost uniformly by courts for two reasons. First, the legislative process favors compromise approaches to complex issues. Second, framing choices inherent in tort law and chosen by reform advocates may have facilitated selection of the modified form because they highlighted extreme examples of harm caused by the contributory negligence system and thus exaggerated the extent to which the modified form of comparative fault would remedy the range of problems inherent

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emergency doctrine arose as a method of ameliorating the, sometimes *harsh*, 'all or nothing' rule in contributory negligence systems." (emphasis added)); Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 458 (Ark. 1977) ("The decided trend is away from the *harsh* results which occur in the application of the contributory negligence rule of law." (emphasis added)); Haysville U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 199 (Kan. 1983) ("The comparative negligence concept comes as a result of a desire to soften the *harsh* 'all or nothing' rule of common law contributory negligence." (emphasis added)); Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280, 286 (Me. 1984) ("Thus, the comparative negligence statute does not create any new defenses. Its sole purpose is to eliminate the *harsh*, all-or-nothing consequence of the contributory negligence defense." (citation omitted) (emphasis added)).

61. *See supra* note 60.

62. Dobbs, *supra* note 36, at 392.

63. Becker, *supra* note 36, at 881.

in that system.

For contemporary tort reform proposals, the lessons of this Article are both clear and gloomy. Compromises may be inimical to reasonable tort reform. For that reason it may be desirable—although difficult—to avoid them. Where extreme examples cloud debate, advocates should be aware of that process and have the creativity to develop rival extreme examples as a way to increase the chance that the moderate instances that may represent the majority of real cases will not be overlooked. Fighting misleading examples with alternative misleading examples cannot be heartening, but it may improve legislative results.

Appendix

STATE ADOPTIONS OF COMPARATIVE NEGLIGENCE: 1969-1984[64]
(showing system adopted and mode of adoption)

Legislative adoption shown in light type (example: Hawaii)
Judicial adoption shown in bold italicized type (example: ***Rhode Island***)

YEAR	MODIFIED FORM	PURE FORM
1969	Hawaii Massachusetts Minnesota New Hampshire	
1970	Vermont	
1971	Colorado Idaho Oregon	***Rhode Island***
1972		
1973	Connecticut Nevada New Jersey North Dakota Oklahoma Texas Utah Wyoming	***Florida*** Washington
1974	Kansas	
1975	Montana	***Arkansas*** ***California*** New York
1976	Pennsylvania	
1977		
1978		
1979	***West Virginia***	Louisiana ***Michigan***
1980	Ohio	
1981		***Illinois*** ***New Mexico***
1982		***Iowa***
1983	Indiana	***Missouri***
1984	Delaware	Arizona ***Kentucky***

64. This Appendix reports initial adoptions. Judicial or legislative changes after a state's initial adoption of comparative negligence are not reported.

Alabama
Alabama has not adopted comparative negligence and continues to utilize contributory negligence. Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330 (Ala. 1993).

Alaska
The Alaska judiciary adopted the pure form of comparative negligence in 1975. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975).

Arizona
The Arizona legislature adopted the pure form of comparative negligence in 1984. ARIZ. REV. STAT. ANN. § 12-2505 (1984).

Arkansas
The Arkansas legislature originally adopted the pure form of comparative negligence in 1955. 1955 Ark. Acts 443.

California
The California judiciary adopted the pure form of comparative negligence in 1975. Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975).

Colorado
The Colorado legislature adopted the modified form of comparative negligence in 1971. COLO. REV. STAT. ANN. § 13-21-111 (West 1971).

Connecticut
The Connecticut legislature adopted the modified form of comparative negligence in 1973. CONN. GEN. STAT. § 52-572h (1973).

Delaware
The Delaware legislature adopted the modified form of comparative negligence in 1984. DEL. CODE ANN. tit. 10, § 8132 (1984).

District of Columbia
The District of Columbia has not adopted comparative negligence and continues to utilize contributory negligence. R. & G. Orthopedic Appliances and Prosthetics, Inc. v. Curtin, 596 A.2d 530, 544 (D.C. 1991).

Florida
The Florida judiciary adopted the pure form of comparative negligence in 1973. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

Georgia
The Georgia legislature first abandoned contributory negligence in an 1863 statute that stated, "the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." GA. CODE ANN. § 51-11-7

(1863). The same year, the Georgia legislature specifically adopted comparative negligence for railroad cases. *Id.* § 46-8-291. The Georgia judiciary gradually combined these statutes and developed a general system of modified comparative negligence. *See, e.g.*, Elk Cotton Mills v. Grant, 79 S.E. 836, 838 (Ga. 1913).

Hawaii
The Hawaii legislature adopted the modified form of comparative negligence in 1969. HAW. REV. STAT. § 663-31 (1969).

Idaho
The Idaho legislature adopted the modified form of comparative negligence in 1971. IDAHO CODE ANN. § 6-801 (1971).

Illinois
The Illinois judiciary adopted the pure form of comparative negligence in 1981. Alvis v. Ribar, 421 N.E.2d 886, 898 (Ill. 1981).

Indiana
The Indiana legislature adopted the modified form of comparative negligence in 1983. IND. CODE ANN. § 34-51-2-6 (1983).

Iowa
The Iowa judiciary adopted the pure form of comparative negligence in 1982. Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982). The Iowa legislature later adopted the modified form. IOWA CODE § 668.3 (1984).

Kansas
The Kansas legislature adopted the modified form of comparative negligence in 1974. KAN. STAT. ANN. § 60-238a (1974).

Kentucky
The Kentucky judiciary adopted the pure form of comparative negligence in 1984. Hilen v. Hays, 673 S.W.2d 713, 720 (Ky. 1984).

Louisiana
The Louisiana legislature adopted the pure form of comparative negligence in 1979. LA. CIV. CODE ANN. art. 2323 (1979).

Maine
The Maine legislature adopted the modified form of comparative negligence in 1965. ME. REV. STAT. ANN. tit. 14, § 156 (1965).

Maryland
Maryland has not adopted comparative negligence and continues to utilize contributory negligence. Harrison v. Montgomery County Bd. of Educ., 456 A.2d 894, 903 (Md. 1983).

Massachusetts
The Massachusetts legislature adopted the modified form of comparative negligence in 1969. MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2000).

Michigan
The Michigan judiciary adopted the pure form of comparative negligence in 1979. Placek v. Sterling Heights, 275 N.W.2d 511, 520 (Mich. 1979).

Minnesota
The Minnesota legislature adopted the modified form of comparative negligence in 1969. MINN. STAT. ANN. § 604.01 (West 2000).

Mississippi
The Mississippi legislature adopted the pure form of comparative negligence in 1910. MISS. CODE ANN. § 11-7-15 (West 1999).

Missouri
The Missouri judiciary adopted the pure form of comparative negligence in 1983. Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983).

Montana
The Montana legislature adopted the modified form of comparative negligence in 1975. MONT. CODE ANN. § 27-1-702 (2005).

Nebraska
The Nebraska legislature enacted the "slight gross" system of comparative negligence in 1913. NEB. REV. STAT. § 25-21,185 (1995).

Nevada
The Nevada legislature adopted the modified form of comparative negligence in 1973. NEV. REV. STAT. ANN. § 41.141 (2002).

New Hampshire
The New Hampshire legislature adopted the modified form of comparative negligence in 1969. N.H. REV. STAT. ANN. § 507:7-d (1997).

New Jersey
The New Jersey legislature adopted the modified form of comparative negligence in 1973. N.J. STAT. ANN. § 2A:15-5.1 (West 2000).

New Mexico
The New Mexico judiciary adopted the pure form of comparative negligence in 1981. Scott v. Rizzo, 634 P.2d 1234, 1242 (N.M. 1981).

New York
The New York legislature adopted the pure form of comparative negligence in 1975. N.Y. C.P.L.R. § 1411 (McKinney 1997).

North Carolina
North Carolina has not adopted comparative negligence and continues to utilize contributory negligence. Miller v. Miller, 160 S.E.2d 65, 73-74 (N.C. 1968).

North Dakota
The North Dakota legislature adopted the modified form of comparative negligence in 1973. N.D. CENT. CODE § 9-10-07 (repealed 1987).

Ohio
The Ohio legislature adopted the modified form of comparative negligence in 1980. OHIO REV. CODE ANN. § 2315.33 (LexisNexis 2005).

Oklahoma
The Oklahoma legislature adopted the modified form of comparative negligence in 1973. OKLA. STAT. tit. 23, § 13 (2005).

Oregon
The Oregon legislature adopted the modified form of comparative negligence in 1971. OR. REV. STAT. § 31.600 (2004) (formerly § 18.470).

Pennsylvania
The Pennsylvania legislature adopted the modified form of comparative negligence in 1976. PA. CONS. STAT. § 7102 (2006).

Rhode Island
The Rhode Island legislature adopted the pure form of comparative negligence in 1971. R.I. GEN. LAWS § 9-20-4 (2005).

South Carolina
The South Carolina judiciary adopted the modified form of comparative negligence in 1991. Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991).

South Dakota
The South Dakota legislature enacted the "slight gross" system of comparative negligence in 1941. S.D. CODIFIED LAWS § 20-9-2 (2006).

Tennessee
The Tennessee judiciary adopted the modified form of comparative negligence in 1992. McIntyre v. Balentine, 833 S.W.2d 52, 53 (Tenn. 1992).

Texas
The Texas legislature adopted the modified form of comparative negligence in 1973. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (Vernon 2006).

Utah
The Utah legislature adopted the modified form of comparative negligence in 1973. UTAH CODE ANN. § 78-27-38 (2005).

Vermont
The Vermont legislature adopted the modified form of comparative negligence in 1970. VT. STAT. ANN. tit. 12, § 1036 (2005).

Virginia
Virginia has not adopted comparative negligence and continues to utilize contributory negligence. Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987).

Washington
The Washington legislature adopted the pure form of comparative negligence in 1973. WASH. REV. CODE § 4.22.005 (2006).

West Virginia
The West Virginia judiciary adopted the modified form of comparative negligence in 1979. Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979).

Wisconsin
The Wisconsin legislature adopted the modified form of comparative negligence in 1931. WIS. STAT. § 895.045 (2005).

Wyoming
The Wyoming legislature adopted the modified form of comparative negligence in 1973. WYO. STAT. ANN. § 1-1-109 (2006).

DECODING CYBERPROPERTY

GREG LASTOWKA*

> *So, in the memory of men yet living, the great inventions that embodied the power of steam and electricity, the railroad and the steamship, the telegraph and the telephone, have built up new customs and new law. Already there is a body of legal literature that deals with the legal problems of the air.*
>
> —Justice Benjamin Cardozo[1]

New technologies, as Justice Cardozo noted, can give rise to new laws. This Article examines the history and development of one such technology-enabled legal doctrine: cyberproperty.

Recently, several legal commentators have argued that common law doctrines should be expanded to give owners of computing equipment the right to prohibit others from interacting with their equipment in ways that cause no physical damage or software malfunctions. The creation of a new "cyberproperty" right has been endorsed by a diverse set of scholars.[2] The

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I should probably also note here that, along with William McSwain and Richard Berkman, I was counsel for Ken Hamidi in *Intel v. Hamidi*. The views expressed here are my own.

1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 62 (1921).

2. *See, e.g.*, Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164 (2004); Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003) [hereinafter Epstein, *Cybertrespass*]; Richard A. Epstein, Intel v. Hamidi*: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147 (2005) [hereinafter Epstein, Intel v. Hamidi]; Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005); I. Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, J. ONLINE L. art. 7 (1996); David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL'Y 109 (2005) [hereinafter McGowan, *The Trespass Trouble*]; David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341 (2003) [hereinafter McGowan, *The Case for Consent*]; R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457 (2005); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002). Student commentators have joined in the call for cyberproperty rights as well. *See, e.g.*, Julie Beauregard, Note, Intel Corp. v. Hamidi*: Trespassing in Cyberspace*, 43 JURIMETRICS J. 483 (2003); J. Brian Beckham, Note, Intel v. Hamidi*: Spam as a Trespass to Chattels—Deconstruction of a Private Right of Action in California*, 22 J. MARSHALL J. COMPUTER & INFO. L. 205 (2003); Patty M. DeGaetano, Note, Intel Corp. v. Hamidi*: Private Property, Keep Out—The Unworkable Definition of Injury for a Trespass to Chattels Claim in Cyberspace*, 40 CAL. W. L. REV. 355 (2004); David M. Fritch, *Click Here for Lawsuit—Trespass to Chattels in Cyberspace*, 9 J. TECH. L. & POL'Y 31 (2004); Daniel Kearney, *Network Effects and the Emerging*

essence of the new right is "a right to exclude others from access to network-connected resources."[3] The cyberproperty right is generally conceived of as absolute. Other commentators have noted with alarm the extent to which courts have seemed to embrace arguments for cyberproperty.[4]

This Article examines recent developments in both the doctrine and theory of the cyberproperty right. The first part of this Article looks primarily at two seminal cases that might be considered bookends to the story of cyberproperty: *Thrifty-Tel, Inc. v. Bezenek*[5] and *Intel Corp. v. Hamidi*.[6] The *Thrifty-Tel* case is known as the starting point of cyberproperty. The *Hamidi* case is sometimes seen as concluding the story of cyberproperty, but in fact, it leaves cyberproperty doctrine largely an open issue.

The second part of this Article, anticipating future struggles over the scope of cyberproperty rights, challenges two assumptions that act as theoretical and rhetorical engines driving arguments for cyberproperty. The first questionable assumption is that an interest in prohibiting others from interacting with networked computing machinery is properly seen as analogous to an interest in excluding others from entering into or using real or personal property. This assumption is generally coupled with a belief that the creation of new private property rights in "cyberspace" (that might be allocated by market mechanisms) is the best means of promoting the public good. The second questionable assumption is that the social power of computer code should be understood as either equivalent to or interchangeable with the power of law. This reasoning generally seems to follow from Professor Lawrence Lessig's claim that "code is law."[7]

Both of those assumptions seem to drive arguments for cyberproperty and both need to be questioned. With regard to the first assumption, the legally salient features of computer code include features that should resist categorization as property—at least in traditional senses of that word. Even within "law and economics" approaches, there are abundant reasons to be skeptical of the desirability of treating digital information resources as analogous to traditional property. With regard to the second assumption, code is very much unlike law. Conflating technological powers of exclusion with law can have a tendency to confuse as much as illuminate the proper role of law in the digital environment.

Doctrine of Cybertrespass, 23 YALE L. & POL'Y REV. 313 (2005).

3. Wagner, *supra* note 2, at 496.

4. *See, e.g.*, Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003); Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433 (2003); Jane K. Winn, *Crafting a License to Know from a Privilege to Access*, 79 WASH. L. REV. 285 (2004).

5. 54 Cal. Rptr. 2d 468 (Ct. App. 1996).

6. 71 P.3d 296 (Cal. 2003).

7. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

I. CYBERPROPERTY IN LEGAL DOCTRINE

Debates over cyberproperty law are not simply debates over the wisdom of new legislative enactments. They are debates over the evolution and interpretation of the common law in a new technological context. Given that cyberproperty has grown through cases attempting to remedy cyberspatial harms with the "ancient" doctrine of trespass to chattels, it makes sense to start any discussion with a history of that legal doctrine.[8]

A. The Birth of Cyberproperty Doctrine

The first cyberproperty case is usually said to be *Thrifty-Tel, Inc. v. Bezenek*.[9] This is because *Thrifty-Tel* was the first case to apply the trespass to chattels doctrine to the operation of networked digital machines. *Thrifty-Tel* involved two teenagers (invariably described in all secondary literature as "hackers"[10]) who were attempting to obtain "free" long distance service. Ryan and Gerry Bezenek, the "Bezenek boys," had obtained a confidential phone number that allowed them to dial into a commercial long distance switching network.[11] The boys dialed into the network and then attempted to find a working access code by manual guessing. They manually punched in various six digit sequences (making 162 calls over several days), but this was to no avail, and they failed to find a working number.

Frustrated, they turned to automation, using a computer program to dial and guess randomly at access codes.[12] Over a seven-hour period, they made 1300

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8. Ticketmaster Corp. v. Tickets.Com, Inc., No. CV99-7654-HLH (VBKx), 2003 U.S. Dist. LEXIS 6483, at *11 (C.D. Cal. Mar. 6, 2003) ("The trespass to chattels issue requires adapting the ancient common law action to the modern age."); Epstein, Intel v. Hamidi, *supra* note 2, at 149 ("ancient rules of trespass to chattels").

9. *See, e.g.*, Bellia, *supra* note 2, at 2260; Burk, *supra* note 4, at 29; Kevin Emerson Collins, *Cybertrespass and Trespass to Documents*, 54 CLEV. ST. L. REV. 41, 46-48 (2006); Adam Mossoff, *Spam—Oy, What a Nuisance!*, 19 BERKELEY TECH. L.J. 625, 641 (2004); Steven Kam, Note, Intel Corp. v. Hamidi*: Trespass to Chattels and a Doctrine of Cyber-Nuisance*, 19 BERKELEY TECH. L.J. 427, 433 (2004); Laura Quilter, Note, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKELEY TECH. L.J. 421, 428-29 (2002).

10. Though the court also referred to the boys this way, *see Thrifty-Tel*, 54 Cal. Rptr. 2d at 471, it should be noted that the term also has a more positive meaning. For in-depth discussions of what "hacking" might mean, see STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION 23-35 (1984) (explaining the generally licit origins of the term); DOUGLAS THOMAS, HACKER CULTURE 10-11 (2002); E. Gabriella Coleman, The Social Construction of Freedom in Free and Open Source Software: Hackers, Ethics, and the Liberal Tradition (Aug. 2005) (unpublished Ph.D. dissertation, University of Chicago) (on file with author). It is quite possible that the boys thought they were "phreaks" rather than hackers. *See* Michael Lee et al., *Electronic Commerce, Hackers, and the Search for Legitimacy: A Regulatory Proposal*, 14 BERKELEY TECH. L.J. 839, 857 (1999).

11. *See Thrifty-Tel*, 54 Cal. Rptr. 2d at 471.

12. This type of "dumb" password guessing is generally described as a "dictionary attack."

automated calls to the network. Roughly one new phone call was made every twenty seconds, followed by an automated random six-digit number guess. This also failed to produce a working account code. It succeeded, however, in tying up the small Thrifty-Tel switching network so completely that paying customers were unable to make use of it.[13]

Thrifty-Tel had known since the first manual calls that the Bezenek household was the source of the numerous failed access attempts. Rather than contact the Bezeneks, they went to state court and brought suit against the Bezenek boys' parents. The trial court found the boys liable for fraud and conversion. Thrifty-Tel was awarded almost $50,000 in damages and attorney fees.[14] Damages were based largely upon Thrifty-Tel's uniform tariff schedule that charged thousands of dollars for every day of "unauthorized access" to its system.

The Bezenek parents appealed the decision. California Court of Appeals Justice Thomas Crosby, Jr. was faced with a doctrinal puzzle. The trial court had found that the Bezenek boys had committed conversion by appropriating Thrifty-Tel's services. This seemed to be a legal error, because the existing law held that intangibles were generally not subject to the tort of conversion under California law.[15] Justice Crosby noted that "Dean Prosser has cautioned against scuttling conversion's tangibility requirement altogether . . . ."[16] Rather than venture into an open conflict with the leading treatise on torts, Justice Crosby concluded that the plaintiffs had made a successful claim of trespass to chattels (which they had not pleaded).

Trespass to chattels is sometimes described as an "ancient" tort,[17] though it is not much more ancient than most other torts found in the common law. It seems somewhat antiquated today because it is so rarely encountered, having been rendered marginal by the historical expansion of the law of conversion. Trespass to chattels remains a potentially useful tort because it recognizes a more subtle form of injury than conversion recognizes.[18] Where damages to personal property fall short of the "forced sale" damages found in conversion, trespass to chattels steps in to provide a cause of action.[19]

See James Grimmelmann, *Regulation by Software*, 114 YALE L.J. 1719, 1743 (2005).

13. *See Thrifty-Tel*, 54 Cal. Rptr. 2d at 471.

14. *Id.* at 472.

15. Several years later, Judge Kozinski of the Federal Court of Appeals for the Ninth Circuit brushed away this doctrinal problem with the law of conversion. *See* Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003); *infra* Part II.A (discussing the *Kremen* case).

16. *See Thrifty-Tel*, 54 Cal. Rptr. 2d at 472 (citing PROSSER & KEETON ON THE LAW OF TORTS § 15, at 92 (5th ed. 1984) [hereinafter PROSSER & KEETON]).

17. *See, e.g.*, Epstein, Intel v. Hamidi, *supra* note 2, at 148-49 ("the ancient rules of trespass to chattels").

18. *See generally* Russ VerSteeg, *Law in Ancient Egyptian Fiction*, 24 GA. J. INT'L & COMP. L. 37, 61 n.100 (1994) (comparing trespass to chattels with conversion).

19. In a claim of conversion, a successful plaintiff essentially obtains a forced sale of the chattel to the tortfeasor. A claim of trespass to chattels awards the plaintiff only those damages

The term "trespass" in "trespass to chattels" simply denotes a legally cognizable form of unlawful injury, not a spatial "trespass" as that term is used in popular discourse. A trespass to chattels lies where there is intermeddling with or dispossession of personal property.[20] Unlike in the case of trespass to real property, a plaintiff claiming trespass to chattels must provide evidence of some actual damage or dispossession of the chattel by the defendant in order to bring a claim.[21] For example, although brushing against another person's car despite an explicit prohibition against doing so is generally considered rude, it is not a trespass to chattels.[22] The owner of the car is free to try to prevent others from touching the car, of course, but the state will not become involved if those efforts fail. Compare this to the case of land, where spatial trespass can be found and enjoined by the state without regard to the possibility of some damage to the land.[23]

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caused by the interference. To illustrate this difference: if a car were stolen and/or destroyed, a tortfeasor should be forced to pay the owner the full value of the car—this is conversion. If, on the other hand, a car or another chattel were merely scratched, compensation for cosmetic repairs would be warranted, but the forced sale of the entire car would provide the plaintiff with an unwarranted windfall. In such a case, trespass to chattels—called by Prosser and Keeton "a little brother of conversion"—steps in to provide an appropriate remedy. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473; Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003) (citing the treatise); PROSSER & KEETON, *supra* note 16, § 14, at 85-86.

20. *See generally* RESTATEMENT (SECOND) OF TORTS § 216-48 (1965).

21. PROSSER & KEETON, *supra* note 16, § 14, at 85-86.

22. There is one interesting exception in the RESTATEMENT (SECOND) OF TORTS § 218 cmt. h (1965). If one person uses another's toothbrush, the chattel would seem to be "damaged" in some way, pursuant to prevalent social beliefs pertaining to hygiene and saliva-swapping. One imagines this should be true although the toothbrush has not suffered visible damage, and may very well be, from a logical and medical standpoint, as good as new. *Cf.* McGowan, *The Case for Consent*, *supra* note 2, at 344 n.18 (discussing the toothbrush illustration and noting "the owner might *reasonably* feel less keen on using the chattel again" (emphasis added)). The forced sale of conversion, however, would seem to be the preferred and appropriate legal remedy for the tort of toothbrush misuse.

Another Restatement illustration points out the rule of the damage requirement: a child pulling a dog's ears is not trespass to the chattel. Oddly enough, this was a real case. Elaine Glidden, a child, pulled the ears of a dog named Toby. Toby bit her. Elaine's mother sued and Toby's owners claimed they were immunized from liability under the applicable statute because Elaine was engaged in tortious conduct at the time she was bitten. The court rejected this defense. *See* Glidden v. Szybiak, 63 A.2d 233, 235 (N.H. 1949) ("No claim was advanced at the trial that the dog Toby was in any way injured by the conduct of the plaintiff Elaine. Consequently she could not be held liable for a trespass to the dog."); *see also* CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (discussing briefly the *Glidden* case).

23. *See* Ellen P. Goodman, *Spectrum Rights in the Telecosm to Come*, 41 SAN DIEGO L. REV. 269, 326-27 (2004). Calabresi & Melamed's theory of "property" rules as opposed to "liability" rules thus relies on a dichotomy that resonates with real property but seems less applicable to personal property. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and*

There is a lively debate about the reasons for this interesting difference between real and personal property "trespass" regimes. Some commentators suggest the difference may be overstated or perhaps even an unwarranted American aberration from English common law.[24] But even those who feel this way acknowledge that the law currently treats the two forms of trespass differently.[25] The Prosser & Keeton treatise, relied upon by the court in *Thrifty-Tel*, explains that "the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them."[26]

Probably the most popular explanation for the difference seen between the law of trespass to land and chattels is that the state has a less significant interest in protecting things from being touched. The state presumably would not want to hear cases about those who happen to, in public places, defiantly touch cars, umbrellas or dogs. The social cost of addressing such dignitary harms outweighs the social benefits that state intervention might provide.[27]

On the trespass to chattels claim, Justice Crosby's opinion in *Thrifty-Tel* can be read as consistent with traditional doctrine. Indeed, *Thrifty-Tel* was ultimately understood as consistent with traditional California common law by a majority of the California Supreme Court.[28] The opinion explicitly acknowledged the requirement of injury to state a claim for trespass to chattels and the requisite damage was clearly evident—the switching network was overburdened by the

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Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972); *see also* Dan L. Burk, *Legal Consequences of the Cyberspatial Metaphor*, *in* 1 INTERNET RESEARCH ANNUAL 17 (Mia Consalvo et al. eds., 2003). For a concise summary of the theory and subsequent literature, see Goodman, *supra*, at 334-37. The theory has been applied to cyberproperty as well. *See, e.g.*, Bellia, *supra* note 2, at 2189-90; Wagner, *supra* note 2, at 498, 509-11.

24. Epstein, *Cybertrespass*, *supra* note 2, at 76-78.

25. *See, e.g.*, Epstein, *Cybertrespass*, *supra* note 2, at 73, 76 (acknowledging that real property rules do not apply to chattels); McGowan, *The Case for Consent*, *supra* note 2, at 356-57 ("[T]he law traditionally protected harmless invasions of chattels by giving owners a privilege to use self-help rather than by giving them a cause of action, which owners of land did have.").

26. PROSSER & KEETON, *supra* note 16, § 14, at 87. An analogous summary of the distinction can be found in the RESTATEMENT (SECOND) OF TORTS § 218 cmt. e ("The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection.").

27. *See generally* Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 154 (1998) (describing how new property rights are inefficient in instances of high administrative costs and negligible social benefits); Goodman, *supra* note 23, at 325 (highlighting the significance of administrative costs that could result from the application of property principles to disputes over spectrum rights).

28. Intel Corp. v. Hamidi, 71 P.3d 296, 303-04 (Cal. 2003). However, it should be noted that Justice Janice Rogers Brown (now a member of the United States Court of Appeals for the District of Columbia Circuit) argued in her dissent that *Thrifty-Tel* stood for the proposition, contrary to the traditional common law view, that any unauthorized use of a chattel was actionable as a trespass. *Id.* at 324-25 (Brown, J., dissenting).

boys' conduct to a point that the network could not be used by paying subscribers.[29]

Despite its fealty to traditional doctrine, *Thrifty-Tel* is generally known as the first "cyberproperty" case due to one rather confusing footnote.[30] Carrying forward his earlier concerns about the requirement of tangibility for conversion, Justice Crosby inscrutably noted in footnote six that the "trespass" alleged in the case was of an intangible variety.[31] The need for this footnote was unclear—why should the tangibility or intangibility of the *means* of a trespass to chattels be relevant to the case? The switching network was clearly a tangible machine.[32] This established the necessary tangibility. There was no recognized tangibility issue about the *means* of conversion or trespass to chattels.

By analogy, a claim based upon theft or destruction of a claimed intangible chattel *interest* (destroying a person's *pride* in a car) would raise considerable problems if one is concerned about curtailing the harms addressed by property law. The *means* that one might use to damage a chattel, on the other hand, would not seem to be relevant. Partial destruction of another person's car by an intangible laser beam or by a tangible sledge hammer should reasonably produce the same type of tort liability.

An investigation of *means* of trespass, however, might have been proper if the case had involved a trespass to real property. A plaintiff claiming real property trespass in California (and many other jurisdictions) must prove a tangible *means* of spatial intrusion. Throwing a rock on someone's lawn will give rise to a claim for trespass to real property. On the other hand, the transmission of noise, smoke, or light cannot form the basis for a claim of trespass to real property in California—those types of spatial "intrusions" are considered under the law of nuisance. [33]

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29. Justice Crosby in fact reversed the trial court on the basis that the $50,000 damage calculations were faulty because they were based upon uniform tariff rates. He instead required the plaintiff to prove "actual damages." His opinion stated: "[S]urely [Thrifty-Tel] is able to produce evidence showing with reasonable certainty any damages caused by Ryan and Gerry in November 1991." Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 474-75 (Ct. App. 1996).

30. *Id.* at 473 n.6.

31. *Id.*

32. If processing power were understood as a chattel, this would trigger the same "tangibility" concerns found in the doctrine of conversion. *See* People v. Johnson, 560 N.Y.S.2d 238 (Crim. Ct. 1990) (finding the possession of a long distance access code to be a possession of "stolen property" under New York law); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1609-10 (2003) (noting that early applications of common law to computer access crimes were theoretically inconsistent, but generally found property interests to exist in intangibles); Quilter, *supra* note 9, at 437-38 ("While computers are undoubtedly chattels, it is questionable whether electronic networks and computer processing power also qualify as chattel.").

33. San Diego Gas & Elec. Co. v. Super. Ct., 920 P.2d 667, 694-96 (Cal. 1996); Wilson v. Interlake Steel Co., 649 P.2d 922, 924-25 (Cal. 1982). *See generally* PROSSER & KEETON, *supra* note 16, § 13, at 71 (distinguishing between trespass by the "invasion of tangible matter" and the

The standard cyberproperty history thus recounts how *Thrifty-Tel* created cyberproperty doctrine when, in footnote six, the court inexplicably cited a series of real property cases in a case involving trespass to chattels. Justice Crosby placed two different forms of "trespass" in uncomfortable proximity to one another by stating:

> [T]he California Supreme Court has intimated migrating intangibles (e.g., sound waves) may result in a trespass, provided they do not simply impede an owner's use or enjoyment of property, but cause damage. In our view, the electronic signals generated by the Bezenek boys' activities were sufficiently tangible to support a trespass cause of action.[34]

Obviously, this was a confusing amalgam of two kinds of trespass—but so what? This entire footnote was irrelevant to the ultimate holding. At most, this footnote inexplicably analyzed the tangibility of trespass *means* in a case involving a trespass to chattels. Nothing in the footnote abrogated the requirement of damage—the court specifically (in the quoted text above) *required* evidence of damage. The footnote was unfortunate and confusing, but in light of the greater context of the case, it was clearly not Justice Crosby's intent to spur a doctrinal revolution.

Even so, many scholars and lawyers see *Thrifty-Tel* as the starting point for cyberproperty doctrine. The notion of cyberproperty was that electronic interactions might be prohibited in the *absence* of damage, and electronic equipment owners might be given the near-absolute[35] right to exclude that is granted to owners of real property.[36] That reading of *Thrifty-Tel* was a highly questionable spin on *Thrifty-Tel* at the time it was decided, but it would become an increasingly accepted reading in subsequent years.

B. The Expansion of Cyberproperty

In 1999, Professor Dan Burk summarized post-*Thrifty-Tel* developments in

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intentional introduction of "smoke, gas, noise, and the like," which are covered by the law of nuisance); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 7.1, at 412 (3d ed. 2000) (citing contradictory authorities on whether invasions by "dust and smoke" constitute a trespass).

34. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6 (internal citation omitted).

35. Even real property rights are not as "absolute" as often claimed to be. *See* State v. Shack, 277 A.2d 369, 373 (N.J. 1971); *see generally* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998).

36. Examples of this reading can be found in scholarly commentary. *See* Mossoff, *supra* note 9, at 642 ("The defendant in *Thrifty-Tel* was found liable for trespass to chattels solely because he gained unauthorized accessed to plaintiff's computer network."); Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 589 (2001) ("Drawing on this precedent, a developing line of cases in the personal property context has held electronic signals to be sufficiently tangible to state a cause of action in trespass to chattels.").

a highly influential article.[37] He noted that the decision gave rise to a line of subsequent cases establishing what appeared to be a nascent cyberproperty right to prohibit electronic contact in the same manner that one could enjoin trespass to real property. Burk blamed *Thrifty-Tel* for the expansion: "the *Thrifty-Tel* version of trespass follows the form of trespass to chattels, and yet has the substance of trespass to land."[38] In Burk's words, *Thrifty-Tel* "essentially reversed several hundred years of legal evolution, collapsing the separate doctrines of trespass to land and trespass to chattels back into their single common law progenitor, the action for trespass."[39] He surmised that "the cause of action masquerading in these cases as 'trespass to chattels' is in fact a novel, hybrid form of a property right whose parameters have yet to be properly defined."[40]

As stated above, this might not have been what *Thrifty-Tel* was initially, but, by the time Burk was writing, it was what *Thrifty-Tel* had become. A string of cases noted by Burk had already extended the purported "trespass" logic of footnote six in *Thrifty-Tel*.[41] These cases involved defendants engaged in the practice of sending massive numbers of commercial email messages—in other words, "spamming." They were generally brought by the internet service providers who received and processed the unwanted email messages. The most famous of these cases was *CompuServe, Inc. v. Cyber Promotions, Inc.*, which relied upon the logic of the *Thrifty-Tel* decision in finding a trespass to chattels.[42]

In all of these cases, sending hundreds of millions of email messages to servers tended to disrupt machine performance in ways that were largely analogous to the disruptions created by the Bezenek boys in *Thrifty-Tel*. Therefore, it is understandable that courts looked to and relied upon *Thrifty-Tel* to enjoin "spamming."[43] But the courts considering these "spam" cases were perhaps somewhat more cognizant than the *Thrifty-Tel* court that they were

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37. Burk, *supra* note 4.

38. *Id.* at 39.

39. *Id.* at 33; Hunter, *supra* note 4, at 487.

40. Burk, *supra* note 4, at 39. Burk was highly critical of "electron trespass." *Id.* at 41. Other scholars were not quite as hostile, but largely agreed with Burk that the *Thrifty-Tel* line of cases were suspect. *See, e.g.*, Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 U. DAYTON L. REV. 179, 203-06 (2001); Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609 (1998); Maureen A. O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 VAND. L. REV. 1965 (2000).

41. *See, e.g.*, Am. Online, Inc. v. Nat'l Health Care Disc., Inc., 121 F. Supp. 2d 1255, 1279-80 (N.D. Iowa 2000); Hotmail Corp. v. Van$ Money Pie Inc., 47 U.S.P.Q.2d (BNA) 1020, 1025 (N.D. Cal. 1998); Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548, 550-52 (E.D. Va. 1998); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025-27 (S.D. Ohio 1997); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 447 (E.D. Pa. 1996).

42. *CompuServe, Inc.*, 962 F. Supp. at 1021-22.

43. *See, e.g., id.*

employing and adapting a common law doctrine in an attempt to solve a new problem that legislatures had been slow to address. Although the mail servers were inevitably impaired by the activities, the courts were not always very careful in spelling out exactly what type of impairment was essential to stating a claim of trespass to chattels.[44] Fixing the spam problem seemed to be a higher priority than doctrinal precision. As a result, the strange ambiguity found in the *Thrifty-Tel* footnote was not removed—it was increasingly, at least implicitly, endorsed.

By 2000, cyberproperty progressed past these commercial spam cases to a more general right to freedom from all forms of electronic "intrusion" on the Internet. That year featured three important cyberproperty decisions, all of which involved plaintiffs seeking injunctions against unauthorized access to websites: *eBay, Inc. v. Bidder's Edge, Inc.*,[45] *Register.com, Inc. v. Verio, Inc.*[46] and *Ticketmaster Corp. v. Tickets.com, Inc.*[47] Two of these cases, *eBay* and *Ticketmaster*, were litigated in California federal district courts, and thus applied the same California common law precedents utilized in *Thrifty-Tel*. Unfortunately, the decisions in these cases did not settle the issue of cyberproperty conclusively.

The *eBay* case gained considerable publicity, and is perhaps still the most popular case involving trespass to chattels found in law school casebooks today. At issue was an attempt by eBay to prohibit another company from conducting regular queries of its online auction data. eBay brought suit in federal district court, under a theory that the querying constituted a trespass to its server system. Though the queries did not overwhelm the computer system as in *Thrifty-Tel*, they did use a significant percentage of the company's resources.[48]

At the district court level, eBay was awarded an injunction against the defendant company, Bidder's Edge, on the basis that there was a significant chance that other companies would attempt to replicate the aggregation activities of Bidder's Edge.[49] An appeal was filed, but the case was settled before it could

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44. *See* Bellia, *supra* note 2, at 2178-81 (querying the basis for claims of damage in cyberproperty decisions).

45. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

46. 126 F. Supp. 2d 238 (S.D.N.Y. 2000), *aff'd*, 356 F.3d 393, 404 (2d Cir. 2004) (citing the Restatement and noting, "[T]he district court found that Verio's use of search robots, consisting of software programs performing multiple automated successive queries, consumed a significant portion of the capacity of Register's computer systems.").

47. Ticketmaster Corp. v. Tickets.com, Inc., No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987, at *19 (C.D. Cal. Aug. 10, 2000) (denying trespass claim on the basis of copyright preemption and noting "In addition, it is hard to see how entering a publicly available web site could be called a trespass, since all are invited to enter."); Ticketmaster Corp. v. Tickets.com, Inc., No. CV99-7654-HLH (BQRX), 2000 U.S. Dist. LEXIS 4553, at *12 (C.D. Cal. Mar. 27, 2000) ("A basic element of trespass to chattels must be physical harm to the chattel (not present here) or some obstruction of its basic function (in the court's opinion not sufficiently shown here).").

48. *eBay*, 100 F. Supp. 2d at 1066-68.

49. *Id.* at 1066 ("Where, as here, the denial of preliminary injunctive relief would encourage

proceed to the Ninth Circuit.[50] eBay may prove to be an attractive case for class discussion simply because it is so ambiguous. Commentators have disagreed about exactly what precedent the *eBay* case established and what portion of the opinion might be regarded as dicta.[51]

The *Ticketmaster* case, decided at roughly the same time, was less publicized, but was understood as an unequivocal loss for the cause of cyberproperty rights. In *Ticketmaster*, the plaintiff sought an injunction against a company that engaged in unauthorized, non-damaging website access. The injunction the plaintiff company sought was denied not once, but twice.[52] The status of trespass to chattels with regard to website access in California was thus in limbo, with two federal district courts taking opposite paths.

The doctrinal zenith of cyberproperty arrived in the 2001 case of *Oyster Software, Inc. v. Forms Processing, Inc.*,[53] a third federal district court case, also set in California. Just like the prior cases about websites, the plaintiff claimed that the defendant committed trespass to chattels because the defendant accessed the plaintiff's website in violation of instructions not to do so.[54] The defendant moved for summary judgment on this claim, stating the plaintiff had not claimed damage to the chattel.[55]

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an increase in the complained-of activity, and such an increase would present a strong likelihood of irreparable harm, the plaintiff has at least established a possibility of irreparable harm.").

50. *See* Troy Wolverton, *eBay, Bidder's Edge End Legal Dispute*, CNET NETWORKS, INC., Mar. 1, 2001, http://news.com.com/2100-1017-253443.html.

51. *See, e.g.*, Bellia, *supra* note 2, at 2178-79 (noting how "different portions of the opinion focus on different possible harms" and concluding that the court "relied both on Bidder's Edge's use of a portion of eBay's servers and on the potential for harm to eBay's servers if others replicated Bidder's Edge's activities."); Lemley, *supra* note 4, at 528 n.27 (stating that the requirement of actual injury was the true holding of the case, but that the dicta of inherent injury via use was the reasoning relied upon by subsequent courts).

52. *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at *11; *Ticketmaster*, 2000 U.S. Dist. LEXIS 12987, *16-17. Judge Hupp would, three years later, revisit the issue a third time in the case. *See* Ticketmaster Corp. v. Tickets.com, No. CV99-7654-HLH (VBKx) 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 6, 2003) ("This approach to the tort of trespass to chattels should hurt no one's policy feelings; after all, what is being attempted is to apply a medieval common law concept in an entirely new situation which should be disposed of by modern law designed to protect intellectual property interests.").

53. No. CV00-0724JCS, 2001 U.S. Dist. LEXIS 22520, *43 (N.D. Cal. Dec. 6, 2001).

54. The plaintiff was upset that the defendant has copied certain information made available on the website. That information was meta data contained in the website's HTML file—data which can be read easily by anyone viewing a webpage. *Id.* at *3-*4. *See generally* F. Gregory Lastowka, *Search Engines, HTML, and Trademarks: What's the Meta For?*, 86 VA. L. REV. 835, 843-45 (2000) (describing HTML meta data). While the access to the webpage was presumably allowed, the defendant's copying of the meta tags was considered "unauthorized" because it was claimed to be a violation of the contractual terms posted on the website. *Oyster Software, Inc.*, 2001 U.S. Dist LEXIS 22520, at *37.

55. *Oyster Software, Inc.*, 2001 U.S. Dist. LEXIS 22520, at *2.

The district court disagreed. Based upon its reading of the progeny of *Thrifty-Tel*, and most importantly of *eBay, Inc. v. Bidder's Edge*, the court concluded that the requirement of damage to the chattel had now been removed in California and that the "defendant's conduct was sufficient to establish a cause of action for trespass . . . simply because the defendant's conduct amounted to 'use' of Plaintiff's computer."[56] Proof of damage to the chattel, according to the court, was no longer required to state a trespass to chattels claim. Simple lack of plaintiff authorization (in this case, contained in a website's terms of use) was deemed sufficient.[57]

Oyster Software made it clear that whatever *Thrifty-Tel* might have meant when decided, it had indeed given birth to something new in the law. The court in *Oyster Software* embraced cyberproperty.

C. Intel Corp. v. Hamidi

Two years later, the California Supreme Court decided the case of *Intel Corp. v. Hamidi*.[58] This was the first decision of the state's highest court on the common law question of the scope of trespass to chattels in the digital environment. The facts of the case were substantially different from those in either *Thrifty-Tel* or *Oyster Software* because the allegedly trespassory activity was the transmission of email. This raised the specter, again, of "spam," the bane of the Internet era. However, the email messages at issue in *Hamidi* were not truly "spam" according to most popular definitions of that word—they were non-commercial messages targeted to a particular audience and containing a pointed message.[59]

Ken Hamidi was a former employee of Intel Corporation. Hamidi sent, over the course of two years, six short textual emails to over 30,000 Intel employees. The emails were sent on behalf of an organization called Former and Current Employees of Intel ("FACE-Intel") and were highly critical of the company.[60] According to the California Supreme Court: "[T]he messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies, solicited employees' participation in FACE-Intel, and urged employees to inform themselves further by visiting FACE-Intel's Web site."[61]

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56. *Id.* at *40.

57. *Id.*

58. 71 P.3d 296 (Cal. 2003).

59. *See, e.g.*, Harvard Law Review Association, *Developments in the Law—The Law of Cyberspace* (pt. 3 *The Long Arm of Cyber-reach*), 112 HARV. L. REV. 1610, 1623 (1999) ("Although Intel raises some of the same concerns as commercial spamming cases such as CompuServe, it is a case of first impression because the challenged speech is not commercial spam, but instead is speech of public concern that lies at the heart of First Amendment protection.").

60. *Hamidi*, 71 P.3d at 301. Hamidi created the recipient address list using an Intel directory on a floppy disk anonymously sent to him. *Id.*

61. *Id.*

Intel instructed its employees not to reply to Hamidi's messages and attempted (with only partial success) to block the messages from reaching their intended recipients. Without employing any complicated technical countermeasures, Hamidi evaded most of Intel's attempts at blocking. Because Intel's email system and policies (like most all company email systems and policies) allowed individual employees to make personal use of their email accounts and to receive messages from previously unknown senders, Hamidi simply sent new FACE-Intel messages from new email accounts on new computers. Though old addresses might have been blocked, pursuant to the default settings on the Intel mail servers, messages from new addresses were generally passed through to Intel employees.[62]

In March 1998, after Hamidi sent a fifth message to Intel employees, Intel contacted Hamidi by letter and demanded that he stop attempting to communicate with Intel employees via their Intel email addresses. The letter warned that if he sent further emails, he would be subject to a lawsuit. In a reply letter, Hamidi stated that he would not be intimidated and that he had a First Amendment right to speak with Intel's employees. Several months later, he sent a sixth FACE-Intel mailing.[63]

Intel then brought suit against Hamidi, proceeding on a *Thrifty-Tel* theory of trespass to chattels.[64] In the early stages of the trial court proceeding, Hamidi lacked counsel and proceeded *in propria persona* against Intel's lawyers. Intel conceded that there was no damage to its chattels as a result of Hamidi's mailings; however, it claimed that it suffered damage due to the time it spent trying to block the messages from FACE-Intel. It also claimed it lost employee productivity due to the contents of Hamidi's communications, and the trial court found this sufficient. In 1999, a permanent injunction was entered prohibiting Hamidi from "sending unsolicited e-mail to addresses on Intel's computer systems."[65]

Hamidi appealed. In 2001, a majority of the judicial panel for the court of appeals affirmed the permanent injunction.[66] The majority cited the inscrutable language from footnote six of *Thrifty-Tel* and declared, "[w]e agree."[67] The appellate panel was explicit about its willingness to endorse the modification of traditional trespass to chattels doctrine, explaining how "[t]he common law

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62. *Id.* at 302.

63. *Id.*

64. Intel included a claim of nuisance as well, but later dropped this cause of action. *Id.* Several commentators, starting with Burk, have suggested that some new formulation of nuisance law might be the apposite common law real property doctrine to protect a putative cyberproperty interest. *See* Burk, *supra* note 4, at 53 ("[T]he correct property theory might be nuisance to web sites, rather than trespass.... Of course, the law of nuisance applies to real property, not to chattels. But this property distinction has proven no obstacle to courts thus far...."); Mossoff, *supra* note 9, at 629 (arguing for the application of nuisance law to prohibit unsolicited commercial email).

65. *Hamidi*, 71 P.3d at 302 (citation omitted).

66. Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244, 246 (Ct. App. 2001).

67. *Id.* at 251.

adapts to human endeavor" and how "the [trespass to chattels] tort has reemerged as an important rule of cyberspace."[68]

Much like the court in *Oyster Software*, decided at the same time, the *Hamidi* appellate court majority relied on *eBay* and *Thrifty-Tel* for the proposition that damage was no longer a requirement of trespass to chattels. Mere electronic contact with computing equipment was deemed sufficient "use" to support injunctive relief.[69] As Dan Hunter noted, the language of the majority's opinion was especially interesting because it seemed to embrace real property metaphors, not just at a doctrinal level, but also at a deeper conceptual level, likening Intel's mail system to a type of real property in the "place" of cyberspace.[70]

Hamidi had argued, consistently with his original claim, that any injunction issued would violate his free speech rights under the federal and state constitutions.[71] These claims were rejected by the majority of the appellate panel. The court stated that the cases cited by Hamidi "differ from the present case in that Hamidi was enjoined from trespassing onto Intel's *private property*."[72] Thus, by analogizing cyberspace to a place and the digital transmission of email to a physical entry "onto" Intel's property, the appellate court avoided addressing free speech issues by avoiding the question of state action. Instead, it privileged what amounted to a new "cyberproperty" interest over the assertion of a constitutionally protected interest in speech.[73]

Justice Kolkey dissented from the appellate panel decision. Unlike the majority, he cited *Thrifty-Tel* not for the creation of cyberproperty rights, but for the proposition that "California cases have consistently required actual injury as an element of the tort of trespass to chattel."[74] Citing Dan Burk's article, he explained how "the extension of the tort of trespass to chattel to the circumstances here has been condemned by the academic literature."[75] Justice Kolkey also argued that Intel's claim of loss of productivity was inadequate to state a claim of trespass to chattels. If this were the case, he said, "then every unsolicited communication that does not further the business's objectives (including telephone calls) interferes with the chattel to which the

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68. *Id.* at 247.

69. *Id.* at 264; *Hamidi*, 71 P.3d at 302 ("The majority [in the appellate decision] took the view that the use of or intermeddling with another's personal property is actionable as a trespass to chattels without proof of any actual injury to the personal property.").

70. Hunter, *supra* note 4, at 487-88 ("[The majority] had characterized Hamidi's actions as 'invading [Intel's] internal, proprietary email system,' and characterized Hamidi's use of the system as 'entry' . . . . [T]he court was conceiving the chattels-based tort in real-property terms.")

71. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 90-91 (1980); Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001). *See generally* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1165-66 (2005) (discussing the *Hamidi* case in the context of free speech and state action doctrines).

72. *Hamidi*, 114 Cal. Rptr. 2d at 254.

73. *Id.*

74. *Id.* at 259 (Kolkey, J., dissenting).

75. *Id.* at 262.

communication is directed simply because it must be read or heard, distracting the recipient."[76] Justice Kolkey's opinion argued not just that cyberproperty rules were an errant interpretation of legal doctrine—they were also a questionable way to regulate communicative activities.[77]

Hamidi petitioned the California Supreme Court and review was granted. In a 4-3 decision, the court reversed the appellate panel. Joining the dissenters (without a separate opinion) was Chief Justice Ronald M. George. Justice Kathryn M. Werdegar, writing for the majority, divided her analysis into three sections: 1) an explanation and application of the traditional doctrine (reversing on the basis that there had been no allegation of damage); 2) a consideration and rejection of arguments for adaptation of the doctrine to remove the requirement of damage in the electronic context; and 3) an explanation (in dicta) that any injunction against Hamidi would be subject to constitutional scrutiny as a limitation on free speech rights.[78]

The first section of the opinion provided the basis for reversal. In that section the court re-affirmed the rule established prior to *Thrifty-Tel* that some damage or impairment to the chattel in question was required to bring an action for trespass to chattels.[79] Intel had relied on the case law that had evolved from *Thrifty-Tel*—precedent that was not binding before the California Supreme Court.[80] Notably, though, the majority of the California Supreme Court did *not* overrule most of these cases, but instead explained and distinguished them. The many cases involving bulk commercial email were distinguished on the basis that the transmissions in those cases "both overburdened the ISP's own computers and made the entire computer system harder to use for recipients."[81] Hence, the facts of the cases provided evidence of "damage" to the chattel by the impairment of the functioning.

With regard to the statement in *eBay* that use of any portion of a computer's

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76. *Id.* at 261.

77. *Id.* at 261-63.

78. *Id.* at 247-58.

79. Intel Corp. v. Hamidi, 71 P.3d 296, 300 (Cal. 2003).

> The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers . . . any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment.

Id.; *see also id.* at 308 (noting the detachment of the injury from any concern about the chattel).

80. The dissenting justices in *Hamidi* faulted the majority for misreading prior cyberproperty cases. *Id.* at 308-10. Given the *de novo* standard of review, however, this is obviously somewhat beside the point. *See* Bellia, *supra* note 2, at 2184 ("eBay involved a federal district court applying California law, a subject on which the California Supreme Court has the last word; and, of course, the *Hamidi* court was free to reject the interpretation of Ohio law reflected in the *CompuServe* case.").

81. *Hamidi*, 71 P.3d at 300.

processing power amounted to a trespass to chattels, the court made clear that this should have been considered dicta and stated that if *eBay* were read to create a new cyberproperty right, it "would not be a correct statement of California or general American law on this point."[82] In essence, the majority decided that trespass to chattels doctrine should retain its traditional character by continuing to require a demonstration of damage to the chattel by a plaintiff.[83]

In Section II of its opinion, the court expressly considered "whether California common law should be extended to cover, as a trespass to chattels, an otherwise harmless electronic communication."[84] In this section, the court considered arguments made by Dan Burk, as well as further developments of those arguments by Professors Dan Hunter,[85] Mark Lemley,[86] and Lawrence Lessig.[87] The language quoted from Hunter, Lemley, and Lessig consisted of opinions that essentially sided with Burk's arguments. The consensus was that the creation of property-like rules of absolute exclusion and mandatory bargaining would have a stifling effect on the free flow of information on the Internet.

The court also addressed arguments to the contrary advanced by Professor Richard Epstein, who had drafted an amicus brief in support of Intel.[88] Esptein, building in part on his similar efforts in the *eBay* case, had written passionately in favor of the judicial creation of a new common law cyberproperty right.[89] Among other things, Epstein had argued that the basis for a cyberproperty right might be found in common rhetorics used to describe digital environments.[90]

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82. *Id.* at 298 (discussing language in *eBay*).

83. *See, e.g.*, Ronnie Cohen & Janine S. Hiller, *Towards a Theory of Cyberplace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 2, 23 (2003) (stating that the *Hamidi* decision "returns the tort of trespass to chattels to its common law roots."); Epstein, *Cybertrespass*, *supra* note 2, at 76-77 (noting that the "standard American legal view" is that "deliberate trespasses to chattels that [result] in neither damage to, nor removal of, the chattel" are not actionable.).

84. *Hamidi*, 71 P.3d at 308.

85. Hunter, *supra* note 4.

86. Professor Mark Lemley wrote the amicus briefing for a group of law professors supporting Hamidi. *See* Brief of Amicus Curiae Professors of Intellectual Property and Computer Law Supporting Reversal, Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244 (Ct. App. July 25, 2002) (No. S103781), *available at* http://www.law.berkeley.edu/institutes/bclt/pubs/lemley/intelvhamidi.pdf [hereinafter Lemley, Brief in Support of Appellant].

87. Lawrence Lessig mentioned and briefly critiqued arguments made by Richard Epstein in the *eBay* litigation. LAWRENCE LESSIG, THE FUTURE OF IDEAS 170-71 (2001).

88. *Hamidi*, 71 P.3d at 309.

89. *Id.*

90. *Id.*; *see also* Epstein, *Cybertrespass*, *supra* note 2, at 82-83 ("Common language speaks of internet 'addresses,' for, of course, individuals and firms occupy private 'sites' along the internet 'highway.' It also speaks of the 'architecture' of the internet, which may direct and influence conduct in both real and virtual 'space.' . . . [C]yberspace looks and functions more like real property than chattels. If one is forced to choose between the two sets of rules, then manifestly the real property rules offer a better fit.").

Epstein pointed the court to the recurrent observation in cyberlaw writing (most thoroughly investigated by Dan Hunter) that cyberspace was conceptualized as a place.[91] He then transformed this into a claim that because cyberspace was understood to be like a place, it should be legally regulated like a place.[92] The *Hamidi* majority, however, explicitly rejected Epstein's argument:

> Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.
>
> Epstein's argument derives, in part, from the familiar metaphor of the Internet as a physical space, reflected in much of the language that has been used to describe it: "cyberspace," "the information superhighway," e-mail "addresses," and the like. Of course, the Internet is also frequently called simply the "Net," a term, Hamidi points out, "evoking a fisherman's chattel." A major component of the Internet is the World Wide "Web," a descriptive term suggesting neither personal nor real property . . . . Metaphor is a two-edged sword.[93]

Section II ultimately purported to be inconclusive. The court stated that it was "discuss[ing] this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution."[94] However, Section II of the opinion indicated that the majority was well aware of theoretical debates surrounding cyberproperty and aware of its power to expand the scope of the common law doctrine.[95] The court's explication of the academic debates made clear that it ultimately sided with the arguments of Burk and similar commentators opposing the expansion of cyberproperty rights.

Finally, in Section III, the majority responded to the critiques of two dissenting justices with "[a] few clarifications."[96] The dissenters had argued for an expansion of the doctrine and opined, like the prior appellate majority, that the First Amendment was inapplicable to the case because the tort of property trespass, once established, trumped any solicitude for speech interests.[97] The majority disagreed, again rejecting metaphorical readings of cyberspace and stressing the fact that the case did not involve a spatial intrusion:

> Hamidi himself had no tangible presence on Intel property, instead speaking from his own home through his computer. He no more invaded

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91. *Id.*; *see also* Hunter, *supra* note 4.

92. *Hamidi*, 71 P.3d at 309.

93. *Id.* at 309. Epstein has objected to this characterization of this argument. *See* discussion *infra* Part II.A.

94. *Hamidi*, 71 P.3d at 311.

95. *Id.* at 309-11.

96. *Id.* at 311-12.

97. *Id.* at 331-32 (Monk, J., dissenting). This approach has been adopted by prior courts. *See, e.g.*, Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 477 (E.D. Pa. 1996) (rejecting the application of First Amendment claims to the corporate email servers of AOL).

> Intel's property than does a protester holding a sign or shouting through a bullhorn outside corporate headquarters, posting a letter through the mail, or telephoning to complain of a corporate practice.[98]

Having rejected the notion that spatial property rights should trump Hamidi's speech rights, the majority stated that Hamidi would have a constitutional defense against the issuance of an injunction on the facts of the case: "[T]he use of government power . . . by an award of damages or an injunction in a private lawsuit, is state action that must comply with First Amendment limits."[99]

Thus, the third section of the majority opinion in *Hamidi* refuted cyberproperty claims in three ways. According to the majority, cyberproperty claims were (1) doctrinally incorrect pursuant to common law precedent, (2) misguided (or at least highly questionable) as an instance of common law evolution, and (3) subject, at least in the case of email, to First Amendment defenses.[100] For these reasons, the *Hamidi* decision is often seen as the California Supreme Court decisively ending the cyberproperty story that began in the wake of *Thrifty-Tel.*

*D. Cyberproperty Post-*Hamidi

Yet the story of the cyberproperty extension of trespass to chattels law has not ended—indeed, it has probably just begun. While California is properly understood as the birthplace and the proving grounds for most all the important decisions regarding cyberproperty, it is only one state among fifty. Other states will likely be called upon to consider anew the issue of cyberproperty.

When other state courts read the *Hamidi* decision, they will find two vigorous dissenting opinions. Justice Janice Rogers Brown wrote an opinion expressing a pronounced commitment to the sanctity of private property rights.[101] She concluded her dissent by arguing that: "The principles of both personal liberty and social utility should counsel us to usher the common law of property into the digital age."[102]

Justice Richard M. Mosk[103] seemed fully willing to embrace the cyberspace analogies to real property ownership by stating that "[Hamidi's] action, in crossing from the public Internet into a private intranet, is more like intruding

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98. *Hamidi*, 71 P.3d at 311-12. The court continued, "[t]hat a property owner may take physical measures to prevent the transmission of others' speech into or across the property does not imply that a court order enjoining the speech is not subject to constitutional limitations." *Id.* at 312 n.8.

99. *Id.* at 311 (emphasis omitted).

100. *Id.* at 308, 311-12.

101. *Id.* at 325 (Brown, J., dissenting) ("Those who have contempt for grubby commerce and reverence for the rarified heights of intellectual discourse may applaud today's decision, but even the flow of ideas will be curtailed if the right to exclude is denied.").

102. *Id.*

103. This was Justice Richard Mosk of the Court of Appeals for the Second District sitting by designation.

into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks."[104] Justice Mosk thought there was sufficient doctrinal support for a finding that the harm alleged by Intel was cognizable.[105] However, citing to Justice Cardozo's *Nature of the Judicial Process*, he also argued that an extension of the common law was warranted in light of technological developments.[106]

These strong judicial intuitions in favor of cyberproperty will likely find new voices. A recent case, *Sherwood 48 Associates v. Sony Corp. of America*,[107] illustrates the potential for the reconsideration of cyberproperty in other jurisdictions. In the *Sherwood 48* case, the defendant Sony had used digital images of certain buildings in Times Squares in order to create the 2002 summer blockbuster *Spider Man*.[108] Sony did not use the unaltered images of the buildings, but instead revised their appearance by replacing existing advertisements with those of Sony's partners. The building owners brought suit. The primary claims in the case were based in trademark law and were ultimately dismissed.[109] However the plaintiffs had also claimed that Sony had committed a trespass to their buildings by taking measurements with lasers.[110] The federal district court seemed perplexed by these claims: "[t]respass?—bouncing a laser beam off a building to create a digital photograph? Light beams bounce off plaintiffs' three buildings day and night in the city that never sleeps."[111]

Of course according to the earlier district court ruling in *Oyster Software*, non-damaging electromagnetic contact with tangible property actually *could* provide the basis for a claim of trespass to chattels.[112] And perhaps for this reason, the Federal Court of Appeals for the Second Circuit reversed the district court's dismissal of the trespass to chattels claim.[113] The Second Circuit, citing to *Hamidi*, stated:

> This case presents an unsettled question of New York state law, to wit, whether a trespass is committed under New York law when a party's physical contact with another party's personal property diminishes the value of that property without damaging that property. . . . A New York

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104. *Hamidi*, 71 P.3d at 326 (Mosk, J. dissenting).

105. *Id.* at 327.

106. *Id.* at 330.

107. 213 F. Supp. 2d 376 (S.D.N.Y. 2002), *aff'd in part, vacated in part, remanded in part*, 76 Fed. App'x 389 (2d Cir. 2003).

108. *See generally* Rebecca J. Brown, *Genetically Enhanced Arachnids and Digitally Altered Advertisements: The Making of* Spider-Man, 8 VA. J.L. & TECH. 1 (2003) (describing the suit and ruminating on similar "digital alteration" issues).

109. *Sherwood 48*, 213 F. Supp. 2d at 377.

110. *Id.*

111. *Id.*

112. Oyster Software, Inc. v. Forms Processing, Inc., No. CV00-0724JLS, 2001 U.S. Dist. LEXIS 22520, at *40 (N.D. Cal. Dec. 6, 2001).

113. *See Sherwood 48*, 76 Fed. App'x at 392.

> court should determine whether physical damage to the Buildings in this case is a prerequisite to a trespass claim.[114]

While the plaintiffs apparently settled their claims, the Second Circuit's decision demonstrates that it remains quite possible that a state judiciary in New York, Virginia, Illinois, or elsewhere, may ultimately decide to reject the *Hamidi* majority's reasoning.

Even if other states choose to follow the *Hamidi* majority, it is uncertain how much the *Hamidi* decision limits the expansion of the cyberproperty doctrine. One might argue that the decision effectively preserved more of the novel cyberproperty theory than it rejected.[115] Only *Oyster Software*, the most extreme enunciation of the cyberproperty concept was singled out as completely inconsistent with the California doctrine.[116] Other cases in the shadow of *Thrifty-Tel* were considered consistent with the holding because the plaintiffs had demonstrated "substantial impairment" to the computing equipment in question.[117] In the *Hamidi* case, Intel admitted that the electronic contact at issue caused *no* damage to its systems. Will any future cyberproperty plaintiffs be inclined to make that same concession? Is it so difficult, as a practical matter, for a potential plaintiff to claim something slightly different?

While a complete absence of damage to the computer equipment is obviously insufficient under *Hamidi*, the definition of impairment to computing equipment is not perfectly clear. Depending on where that threshold is set, the *Hamidi* case may actually leave ample room for the expansion of cyberproperty. For instance, in a recent case in the Northern District of Illinois, a court relied upon the *Thrifty-Tel* line of cases and the decision in *Hamidi* in allowing a trespass to chattels suit to proceed against a defendant company that had installed "spyware" on the plaintiff's computer.[118] The court stated that "[s]imply put, plaintiff

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114. *Id.* Accordingly, the state law claim of trespass to chattels was then dismissed by the federal district court without prejudice. *See* Sherwood 48 Assocs. v. Sony Corp. of Am., No. 02-CV2746, 2004 U.S. Dist. LEXIS 700 (S.D.N.Y. Jan. 18, 2004).

115. *See* Kam, *supra* note 9, at 438 (suggesting that the *Hamidi* decision was primarily significant for the extent to which it *adopted* the novel logic of the *Thrifty-Tel* line of cases). "The court thus adopted the changes imposed upon trespass to chattels by federal district courts in California. . . . If the California Supreme Court wished to repudiate the trend towards breadth in trespass to chattels, it could have done so. It instead embraced the prior decisions . . . ." *Id.*

116. Intel Corp. v. Hamidi, 71 P.3d 296, 307 n.5 (Cal. 2003) (distinguishing the case by saying: "[W]e do not read *eBay* . . . as holding that the actual injury requirement may be dispensed with, and such a suggestion would, in any event, be erroneous as a statement of California law." (footnote omitted)).

117. *See, e.g.*, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444 (E.D. Va. 1998); Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548 (E.D. Va. 1998); Hotmail Corp. v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997).

118. Sotelo v. Direct Revenue Holdings, LLC, 384 F. Supp. 2d 1219, 1229-33 (N.D. Ill. 2005).

alleges that Spyware interfered with and damaged his personal property, namely his computer and his Internet connection, by over-burdening their resources and diminishing their functioning."[119]

From a doctrinal perspective, this is consistent with the holding in *Hamidi*. But what, exactly, is the damage alleged? Almost all forms of electronic interaction with a computer system use *some* resources and thereby diminish *some* functioning. The line that must be crossed with respect to "functional harm or disruption" is not clear.[120] The *Hamidi* opinion essentially invites lower courts to consider these issues on a case-by-case basis. If the *Thrifty-Tel* zeitgeist has not faded, one might well predict that cyberproperty will eventually arrive back at something approaching the rule in *Oyster Software*.[121] On the other hand, if *Hamidi* is given teeth, the requirement of "functional harm" may come to be what Justice Mosk claimed it was in dissent—a requirement of a total system crash in order to state a claim.[122] Between those two extremes lies a broad field of possibilities.

So it seems that the cyberproperty doctrine is at an interesting crossroads that may lead to one of several possible futures.[123] Given the range of possibilities, it is important to note how several legal commentators have recently argued in defense of cyberproperty rights and criticized the *Hamidi* decision as misguided.[124] Other state supreme courts considering the expansion of cyberproperty may look to such scholarly arguments for guidance in applying the ancient doctrine of trespass to chattels to the new frontier of the Internet.

II. CYBERPROPERTY IN LEGAL THEORY

Many recent commentators have been solicitous of the concept of cyberproperty and critical of the *Hamidi* decision.[125] In Part I, I argued that the *Hamidi* decision was correct with regard to traditional legal doctrine. For the most part, cyberproperty proponents have not contested this. Instead, they claim that changes in common law doctrine to embrace cyberproperty would constitute an improvement.

From my perspective, contemporary arguments for cyberproperty are

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119. *Id.* at 1231.

120. *Hamidi*, 71 P.3d at 308.

121. *See, e.g.*, Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238 (S.D.N.Y. 2000), *aff'd*, 356 F.3d 393, 404 (2d Cir. 2004) (finding that trespass to chattels was established where the district court made a determination that "a significant portion" of the recipient machine's "resources" were used).

122. *Hamidi*, 71 P.3d at 326 (Mosk, J., dissenting) ("[T]he majority leave Intel, which has exercised all reasonable self-help efforts, with no recourse unless [Hamidi] causes a malfunction or systems "crash."); *see also* Epstein, *Cybertrespass*, *supra* note 2.

123. Winn, *supra* note 4, at 286 (stating that the *Hamidi* decision is "unlikely to staunch the flow of controversy" over cyberproperty claims).

124. *See generally* sources cited *supra* note 2.

125. *See supra* note 2.

unpersuasive. They seem to rely, generally, on two fairly simple misconceptions. One is the assumption that "code is property" (or at least property-like), and the second is the assumption that "code is law" (or at least law-like). Both of these assumptions have some merit and history in cyberlaw scholarship, but they also have significant flaws when applied to cyberproperty, which will be examined below.

A. Decoding Digital Property

At the bottom of all cyberproperty claims is an intuition that the digital code present within a computer is easily analogized to a form of property. Richard Epstein and Trotter Hardy are two prominent examples of legal theorists who have pushed for the use of analogies to *real* property in support of claims for cyberproperty rights.[126] Professor Hardy raised the possibility of "trespass to website" in 1996, the same year that *Thrifty-Tel* was decided.[127] Professor Epstein continues to argue in favor of "the extension of trespass to land rules to the Internet."[128] He believes it is sound to conflate the interoperations of software with personal entries onto real property and he has strongly criticized the *Hamidi* majority for not doing so.[129] While other cyberproperty proponents are not so bold in arguments for the conflation of real property and digital property, the claim does not always seem foreign to their logic.[130]

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126. Epstein, Intel v. Hamidi, *supra* note 2, at 163; Hardy, *supra* note 2, ¶ 1.

127. Hardy, *supra* note 2, ¶ 1 ("Many of the words used to describe Web sites have a basis in real property: the word 'site' itself is one, as are such expressions as 'home' pages, 'visiting' Web sites, 'traveling' to a site and the like. This usage suggests that the trespass action might appropriately be applied to Web sites as well.").

128. Epstein, Intel v. Hamidi, *supra* note 2, at 157.

> No one would argue that a person is under a duty to open his home or business to some kinds of speech but not others. It hardly makes a difference that Hamidi wants to enter Intel's business by Internet or on foot. The unauthorized entry has long been regarded as a per se violation under ordinary trespass principles. There is no reason to back off that view here.

Id.; *see also* Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 818 (2001) [hereinafter Epstein, *Intellectual Property*] (discussing his arguments in the *eBay* case and stating "The position I take . . . is that the rules that govern ordinary space provide a good template to understand what is at stake in cyberspace.").

129. Epstein, Intel v. Hamidi, *supra* note 2, at 157. "Justice Werdegar's fanciful use of etymology to break the parallel between physical and cyberspace is totally misguided. In one of the worst plays on words imaginable, she concocts a derivation for the term Internet that is false to its history and understanding." *Id.* at 160.

130. *See, e.g.*, Fairfield, *supra* note 2, at 1102 ("[C]yberspace is neither a bad analogy nor a metaphor. Cyberspace is a descriptive term. It describes the degree to which some kinds of code act like spaces or objects. Taking this approach frees us to apply the developed body of property law to assist in solving inefficient allocations of rights on the internet."); Hunter, *supra* note 4, at 516 (stating as a prominent critic of cyberproperty that "attempts to supplant the cyberspace as

Dan Hunter and Mark Lemley have noted how some courts have actually accepted this "code is land" equation.[131] However, most people, including most cyberproperty proponents, seem to agree that there must be some better justification for cyberproperty than the mere claimed metaphorical resemblance between cyberspace and real space.[132]

The first problem with suggesting that cyberspace is a place is that it is not. We might stop there; however, we might further add, that even when cyberspace is perceived as place-like, it is often described as an importantly different kind of space.[133] As Julie Cohen explains in a forthcoming article, the problem here is not that cyberspace is simply a place or non-place, full of property or non-property. The problem is that the "placeness" of cyberspace is a matter of ongoing social construction.[134] Some features and structures of cyberspace resemble structures in physical space, but any straightforward equation of place and cyberspace is far too simplistic. Even if we were to accept the fiction that cyberspace is a place, and ignore the many ways it is not like any other place, there is an additional problem: not all places are privately owned. Calling cyberspace a place does not lead inevitably to the conclusion that the best legal rule for cyberspace is one that mimics private land ownership. There are many real spaces, such as parks, highways, and oceans, that are not privately owned. Some very valuable real spaces, like beaches, are not spaces where the public is excluded.[135]

The claim that cyberspace is equivalent to real space is obviously an issue of faith more than logic, and it is not surprising that most advocates of cyberproperty look elsewhere for persuasive tools. While cyberproperty proponents often pay some tribute to the importance of spatial metaphors, their core claims tend to be something less ambitious: a claim that cyberproperty

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place metaphor are, I think, doomed to failure"); Mossoff, *supra* note 9, at 644 ("When land is dedicated to commercial goals that are achieved only with computers, the interference with the use of these computers is *ipso facto* an interference with the use of the land.").

131. Hunter, *supra* note 4, at 516; Lemley, *supra* note 4, at 527-29.

132. David McGowan has defended those courts that Hunter and Lemley accuse of embracing metaphor claims of property in cyberspace on the basis that the opinions do no such thing, and to the extent that they do, the legal theory of property is no longer restricted to the concept of a physical thing—talk about property is instead properly understood as the proper allocation of entitlements with some secondary relation to particular physical objects. *See* McGowan, *The Trespass Trouble*, *supra* note 2, at 110-11.

133. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 503-06 (1999) (discussing various differences between "real space" and "cyberspace").

134. Julie E. Cohen, *Cyberspace and/as Space*, 107 COLUM. L. REV. (forthcoming 2007), *available at* https://papers.ssrn.com/so13/papers.cfm?abstract_id=898260.

135. *See, e.g.*, Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 919 (2005); *see also* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 752-53 (1986) (discussing the multiple forms of property that are beneficially held in common).

regimes will promote greater efficiency.[136] The "Chicago School" is known for its historic espousal of creating social benefits by legally recognizing new forms of private property rights and thereby encouraging more efficient market transactions.[137] Many cyberproperty proponents are essentially trying to map the theories of Harold Demsetz onto the *terra nova* of cyberspace—parceling out plots of private ownership in order to avoid the tragedies they fear will befall schemes based on common ownership. Harold Demsetz is called into the service of William Gibson.[138]

Harold Demsetz famously pointed out how land held in common would tend to be used inefficiently by rationally selfish individuals engaged in over-grazing and under-cultivating.[139] He argued that legal privatization solved these problems and promoted more efficient and productive uses.[140] Many cyberproperty advocates seem confident that this abstract framework is effective not just with regard to claims about the social benefits obtainable through the privatization of land, but also with regard to privatizing the right to send electrons between networked computers. As Julie Cohen has noted previously, there appears to be a peculiar ideology of "cybereconomics" in play here, something as befitting Gibson's phrase "consensual hallucination" as cyberspace itself.[141]

Statements about "cyberproperty" often seem to rely on a simplified vision of real property laws rather than a rich understanding of property doctrine and how it operates in practice. The exclusive rights recognized in *Oyster Software*

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136. Fairfield, *supra* note 2, at 1051. "[A] theory of virtual property is critical to ensure efficient use of internet resources, lower search costs, and reduce negotiation costs that would otherwise prevent the flow of high-value resources to high-value uses." *Id.* "[V]irtual property ought to be protected because it represents the best way of splitting up use rights so as to cause people to use it efficiently." *Id.* at 1094.

137. *Cf.* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 897 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (noting how property rhetoric in intellectual property discourse has been largely animated not by real property law, but by concepts popularized by the Chicago School law-and-economics movement).

138. WILLIAM GIBSON, NEUROMANCER 51 (1984) (describing "cyberspace" as a "consensual hallucination").

139. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS 347 (1967); *see also* Epstein, Intel v. Hamidi, *supra* note 2, at 164 ("[T]he creation of any commons will chill the incentive to invest."); Fairfield, *supra* note 2, at 1065-67 (explaining Demsetzian theory and applying it to virtual property claims).

140. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 27-28 (2004).

141. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 466 (1998) ("[T]he cybereconomists' debt to the social ideology of Lochner runs deep. Their proposals turn out to be grounded in identical beliefs about the conceptual primacy of private property and private ordering and the illegitimacy of 'redistributive,' market-distorting legislation."); *see also* Frischmann, *supra* note 135, at 931 & n.47.

were much more extreme than any analogous rights that currently exist in real property law.[142] Richard Epstein readily concedes this point,[143] but among other cyberproperty proponents, one senses a conviction that calling something "real property" entitles its owner to an absolute right to exclude others. In real property law, this is not so, as Michael Carrier has recently discussed at length.[144] To treat an entitlement as something analogous to traditional tangible property might invite the creation of numerous limitations on the extent of that right.[145]

But even if we decide that "cyberproperty" should be treated like a form of property, this does not mean that the traditional property rules and traditional limitations on rights would work in this context. If we wish to call the ones and zeros flowing through networks a form of property, we need an approach that is sensitive to the obvious differences between the way bits and land behave.[146] As Lord Blackstone once noted, there are important practical differences between optimal ways to treat things like land and things like water, and these practical differences make themselves known in the law.[147]

The phenomenon of digital communication is a *tertium quid* in property law if ever there was one. The electronic interplays that are captured under the rubric

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142. *See* Rose, *supra* note 35, at 631 ("[P]roperty may be much more porous and changeable than is suggested by the assertion of simple exclusive dominion.").

143. *See* Epstein, *Intellectual Property*, *supra* note 128, at 804-05 (noting that Blackstone's "sole and despotic dominion" is an "exaggeration" and that "the old, tangible property" is exceedingly complicated in terms of entitlement structures) (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES *18 (1st ed. 2001)); *cf. id.* at 819 (stating that in the case of cyberproperty, "[t]here may well be a place for Blackstone's sole and despotic dominion after all.").

144. Carrier, *supra* note 140, at 52 n.216; *see also* Burk, *supra* note 23, at 20; Lemley, *supra* note 4, at 532-33.

145. Michael Carrier has observed this in his provocative response to the increasing "propertization" of the term "intellectual property." *See* Carrier, *supra* note 140, at 8-12, 144-45 (sympathizing with those who wish to resist the expansion of intellectual property laws by avoiding the label of "property," while arguing that the adoption of property rhetorics might open avenues to a desired weakening, rather than a feared strengthening, of private powers).

146. *Cf.* McGowan, *The Trespass Trouble*, *supra* note 2, at 110 ("[Cyberproperty critics claim] that 'property rules' have some unique or intrinsic relation to tangible things like dirt or disk space. Academic analysis of property abandoned this notion long ago. For many years, the dominant use of the term 'property' has referred to how people must deal with each other relative to some resource rather than to the resource itself.").

147. As Blackstone put it:

> For water is a moveable wandering thing, and must of necessity continue common by the law of nature. . . . But the land, which the water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

BLACKSTONE, *supra* note 143, at *18; *see also* Epstein, *Intellectual Property*, *supra* note 128, at 805 (discussing Blackstone's views of water and noting that: "[T]he pressing question is to decide which analogies work across fields and which do not, both in litigation and, for that matter, in legislative reform.").

of "cyberproperty" rights are far different things from the rich soil of the paradigmatic Blackacre. Different rules have historically been applied to land, to the valuable cattle[148] that constituted wealth during ages past,[149] to the water,[150] to the air,[151] and to other forms of "property."

There are probably many ways to explain the close relation between cyberproperty claims and "law and economics" discourse, but I want to observe one connection that is both revealing and surprising. One of the most well-known formational moments in the rather brief history of cyberlaw was an address made in 1996 by Judge Frank Easterbrook of the Federal Court of Appeals for the Seventh Circuit to a conference on the *Law of Cyberspace*. Judge Easterbrook's address was titled *Cyberspace and the Law of the Horse*.[152]

The conventional story of that day portrays Judge Easterbrook as a cynic and a spoiler attempting to throw a wet blanket on the whole enterprise of cyberlaw. Easterbrook told the assembled forward-thinking legal scholars to just go home and give up on this "cyberlaw" project.[153] Judge Easterbrook's essay, recording his remarks, is often cited as a "but see" source in law review footnotes when an author needs to indicate that someone famously sought to cabin irrational enthusiasm about the novelty and importance of cyberlaw.[154]

Judge Easterbrook certainly did say some rather harsh things about the value of interdisciplinary law and technology scholarship. He warned, for instance, that: "Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good

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148. As many teachers of first-year property law inform their students, the term "chattel" is thought to derive from the old French word for cows. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 151 (Cambridge Univ. Press 1968) (1895).

149. *See generally* Carrier, *supra* note 140, at 29-30; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992); Mark A. Lemley, *What's Different About Intellectual Property*, 83 TEX. L. REV. 1097 (2005).

150. Blackstone's comments about water have found new purchase in the debate over cyberproperty. Epstein, Intel v. Hamidi, *supra* note 2, at 157 (predicting that "we can be confident that this [water] metaphor will fall stillborn from the press"); Lemley, *supra* note 4, at 538 (using Blackstone's language to suggest the Internet is, in some ways, like flowing water).

151. Goodman, *supra* note 23, at 272, 364 (describing the conflict of analogies in spectrum law).

152. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207.

153. *Id.* at 207 ("We are at risk of multidisciplinary dilettantism, or, as one of my mentors called it, the cross-sterilization of ideas. Put together two fields about which you know little and get the worst of both worlds."); Lessig, *supra* note 133 (responding to Easterbrook by defending the study of cyberlaw).

154. *See, e.g.*, John W. Bagby, *Cyberlaw: A Foreword*, 39 A. BUS. L.J. 521, 526 (2002); Chad J. Doellinger, *Recent Developments in Trademark Law: Confusion, Free Speech, and the Question of Use*, 4 J. MARSHALL L. REV. INTELL. PROP. L. 387, 393 (2005).

trailblazers."[155] In a way, I would agree with Easterbrook. "Cybereconomic" arguments stand a great chance of being improvident, given all the unknown factors and dimly understood forms of social value that can be found at, in, and through computer networks.[156]

Yet strangely, Judge Easterbrook, speaking in 1996, was perhaps the earliest *proponent* of cyberproperty.[157] He explicitly advised judges to "[c]reate property rights, where now there are none . . . to make bargains possible."[158] He meant this advice to apply specifically to the context of the Internet. Thus, according to Easterbrook himself, there was something new in cyberspace: new forms of property that had not yet been discovered. Accordingly, the judiciary should do something innovative: recognize it, so that the market might distribute it to more efficient uses. Easterbrook clearly believed that generating new cyberproperty rights and privately allocating those new rights through contractual transactions would lead to a better (more efficient) arrangement of Internet resources.[159] He stated, "we need to bring the Internet into the world of property law."[160]

The particular kind of new cyberspace property that Judge Easterbrook had in mind that day was the domain name.[161] In subsequent years, courts and legislatures followed his advice: domain names are now generally recognized as a somewhat peculiar form of property right. The story of domain names has been told before, but it is worth recounting as a foil to the story of trespass to chattels laid out in Part I. Unlike the case with trespass to chattels, there is not much concern today with regard to the fact that domain names are considered a form of legal property. Rather, recent law review articles busily chart the interesting possibilities that flow from this classification. One such possibility is the prospect of judgment creditors seizing and selling the domain names of debtors.[162]

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155. Easterbrook, *supra* note 152, at 207.

156. *Cf.* Frischmann, *supra* note 135, at 928, 932 (suggesting that economics theories may support commons-based approaches to Internet resource management).

157. The year 1996 was certainly a banner year for cyberproperty law. The *Thrifty-Tel* case, Trotter Hardy's essay on trespass to websites, and Easterbrook's statements were all published that year. This was also the year of John Perry Barlow's "Declaration of Independence of Cyberspace" and David Johnson & David Post's famous article "Law Without Borders." David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 8, 1996, http://www.eff.org/~barlow/Declaration-Final.html.

158. Easterbrook, *supra* note 152, at 212.

159. *Id.* at 212-13.

160. *Id.* at 212.

161. *Id.* ("Property rights in domain names is an example of what I have in mind.").

162. *See, e.g.*, Alexis Freeman, L.L.M. Thesis, *Internet Domain Name Security Interests: Why Debtors Can Grant them and Lenders Can Take them in this New Type of Hybrid Property*, 10 AM. BANKR. INST. L. REV. 853, 854 (2002) ("After establishing that a domain name is property of the bankruptcy estate, and that a domain name registrant has a transferable property interest in a domain name, this article will discuss how a creditor may obtain and enforce a security interest in a domain

Domain names originated with some fairly straightforward connections to spatial territories. Physical jurisdictions were "mapped" onto the domain name system beginning in 1983. That was the time of the initial creation of various country-coded top-level domains (such as .uk for the United Kingdom).[163] With regard to certain top-level domains, such as the celebrated "dot-com," new domain names were not keyed to territorial sovereigns. Instead, the domain names were handed out by private companies tasked with that role through a process that looked very much like a law of first possession.[164] In 1994, individuals could register whatever domain names they wanted on practically a first-come, first-serve basis.[165]

As Judge Easterbrook noted, "That led to people storing up domain names."[166] This explosion in registrations, however, did not occur until fairly late in the 1990s. Even in 1994, the company tasked with registrations reported that only two or three people were in charge of approving domain name requests, and in 1993 they processed only about 300 registrations a month.[167] In 1994, a *Wired* journalist, Joshua Quittner, published an article in *Wired* with a subtitle stating: "Right Now There Are No Rules to Keep You from Owning a Bitchin' Corporate Name as Your Own Internet Address." To prove his point, he registered the domain name *www.mcdonalds.com* and attempted to sell it back to McDonalds Corporation, after informing them that the World Wide Web might be worth their attention.[168]

This all changed in short order when what amounted to a virtual land grab gave way to more formal and predictable distributional rules that were rooted in the logic of trademark law. This happened at roughly the same time that Judge Easterbrook delivered his address. Judge Easterbrook opined that, "[a]ppropriation of names and trademarks would not be tolerated in the rest of

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name."); Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. CIN. L. REV. 95, 97 (2003) ("[C]ourts should allow judgment creditors to seize and sell domain names.").

163. Peter K. Yu, *The Origins of ccTLD Policymaking*, 12 CARDOZO J. INT'L & COMP. L. 387, 390-92 (2004) (describing the early history of ccTLDs).

164. Easterbrook, *supra* note 152, at 212; *see also* Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 723-34 (2003) (describing the first-come, first-serve policy); Joseph William Singer, *Approaches to Teaching Property: Starting Property*, 46 ST. LOUIS U. L.J. 565 (2002) (explaining first possession and first capture theories of property rights).

165. *See* Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1298-1306 (1998) (describing the historic evolution of the domain name system). In fact, *some* refusals to register domain names were made, but the basis of such refusals to register is unclear. *See* Joshua Quittner, *Billions Registered: Right Now, There Are No Rules to Keep You from Owning a Bitchin' Corporate Name as Your Own Internet Address*, WIRED, Oct. 1994, at 50-51.

166. Easterbrook, *supra* note 152, at 212.

167. Quittner, *supra* note 165, at 50.

168. *Id.* at 50-51.

the commercial or political world; why so for Internet addresses?"[169] Trademark holders agreed and began bringing suits against people like Quittner for registering what they asserted were *their* domains. The practice of registering a domain that corresponded with the trademark of a third party was branded as "cybersquatting," a term obviously built upon an analogy to real property.[170]

Two 1996 opinions condemned the practice of cybersquatting as a violation of trademark law.[171] Three years later, Congress created a regulatory solution, the Anti-Cybersquatting Consumer Protection Act ("ACPA"), statutorily forbidding cybersquatting within the framework of trademark law.[172] The ACPA allowed for plaintiffs to proceed "in rem" to recover domain names, legislatively reifying the notion that domain names were a form of virtual property.[173]

Other members of the judiciary have shared Easterbrook's enthusiasm for "propertizing" the mixture of computer code and contract law that creates a domain name.[174] For instance, in the Ninth Circuit case of *Kremen v. Cohen*,[175] the plaintiff alleged that the defendant had stolen the domain name "sex.com" by filing a fraudulent transfer document with the domain name registrar. Rather than approach the claim as a matter of contract law, Judge Kozinski wrote for the Ninth Circuit in a decision that equated a plaintiff's original ownership of a domain name with a personal property interest.[176] Hence the problem of

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169. Easterbrook, *supra* note 152, at 212.

170. *See* Chander, *supra* note 164, at 726-27 (noting the connotations of "cybersquatting"); Epstein, *Cybertrespass*, *supra* note 2, at 83 (same).

171. *See* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996), *aff'd*, 141 F.3d 1316 (9th Cir. 1998); Intermatic Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996).

172. *See* 15 U.S.C. § 1125(d) (2000). This statute effectively provided a new cause of action (generally sounding in trademark and placed within the trademark statutes) under which the cybersquatting claims could be brought. *See id.* Cybersquatting is generally doing exactly what Quittner did in 1994—buying a domain name that rightfully belongs to someone else with the intent to sell it for a profit. The difficult question is in trying to decide who is entitled to "own" a particular name where there are multiple legitimate candidates. *See, e.g.*, Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002 (9th Cir. 2004) (pitting earlier registrant Uzi Nissan against the better-known car company); Virtual Works v. Volkswagen, 238 F.3d 264 (4th Cir. 2001) (holding that the registration of the domain name "vw.net" was in "bad faith" in large part because the registrants, Virtual Works, were aware that "VW" was a Volkswagen trademark).

173. *See* 15 U.S.C. § 1125(c)(1)-(3) (2000); *but see* Fairfield, *supra* note 2, at 1055 n.30 (suggesting that the ACPA's statutory placement in trademark law undermines the property analogy).

174. *See* Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105, 1107 (2005) (explaining the ascendancy, in the late twentieth century, of economies based on intangible interests); Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 95 (2003) (noting how intellectual property law subverts the expectations that some classes of things are inherently incapable of private ownership).

175. 337 F.3d 1024, 1026-27 (9th Cir. 2003).

176. *Id.* at 1030. Judge Kozinski stated: "Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. . . . [L]ike other forms of property, domain names are

intangibility in the tort of conversion (which led to the *Thrifty-Tel* decision) was waved away without a backward glance.[177] The *Kremen* decision, as Judge Kozinski noted, was consistent with the "in rem" provisions of the ACPA.[178]

Legal scholars like Anupam Chander have since defended the equation of domain names with property interests, rather than with contracts or technologies.[179] Says Chander: "What are domain names anyway? . . . [E]ven though domain names involve both technology and contract, domain names are better understood as a new form of property arising in the Information Age."[180]

How does the story of domain names relate to the broader notion of cyberproperty rights? In this regard, it is worth considering the recent work of Professor Joshua Fairfield, one proponent of cyberproperty. Fairfield is an advocate of Demsetzian theory and a critic of the *Hamidi* decision.[181] Fairfield argues that when computer code functions in ways that create rivalrous and persistent property-like interests, property concepts might well be employed to step in and resolve disputes where intellectual property concepts currently fail to reach.[182]

Fairfield, however, adds an interesting twist to his argument. In his view, virtual property rights should be theoretically *disconnected* from private rights in computer chattels.[183] The domain name story recounted above actually is much more consistent with Fairfield's vision than it is with the more standard cyberproperty vision that connects the right with a more expansive property interest in chattel ownership. The legal modifications made to the domain name system have so far intruded upon the default rights that certain private actors have with regard to the way certain information is arranged on their computers.[184]

Fairfield argues that the owner of a virtual property may or may not be the

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valued, bought and sold, often for millions of dollars, and they are now even subject to in rem jurisdiction." *Id.* (citation omitted). The other judges on the *Kremen* panel were apparently more cautious about propertizing domain names in this way. *See* Kremen v. Cohen, 314 F.3d 1127 (9th Cir.) (certifying the conversion question to the California Supreme Court), *revised and superseded*, 325 F.3d 1035 (9th Cir.), *aff'd in part, rev'd in part*, 337 F.3d 1024 (9th Cir. 2003); *id.* (Kozinski, J.) (arguing that certification was not necessary).

177. *Id.* Most commentators to address the issue so far have seemed bullish about scrapping the tangibility requirement in conversion law. *See, e.g.*, Richard A. Epstein, *The Roman Law of Cyberconversion*, 2005 MICH. ST. L. REV. 103, 112 (noting that the case raises "the question of whether domain names lose their status as a protectable form of property given their irreducibly intangible nature" but quickly concluding "I shall not dwell on this issue at any length because Kozinski's point seems largely irrefutable.").

178. *Kremen*, 337 F.3d at 1030.

179. *See, e.g.*, Chander, *supra* note 164.

180. *Id.* at 771; *accord* Fairfield, *supra* note 2, at 1052 (arguing that online property rights are needed to balance regimes based on pure contract).

181. Fairfield, *supra* note 2.

182. *Id.* at 1075.

183. *Id.* at 1075, 1078.

184. Am. Online v. Chi-Hsien Huang, 106 F. Supp. 2d 848 (E.D. Va. 2000).

proper owner of either the computer on which that code resides or the owner of the intellectual property rights to the software that gives rise to the virtual property. His arguments map well to the legal result in *Kremen*—where the domain name "owner" had neither IP rights to the code in question, nor owned the relevant chattels on which the code resided.[185]

Again, note the important difference here between Fairfield's view and the view of other cyberproperty proponents. Even standing firmly within a traditional Chicago school economic framework, as Fairfield does, one can find reasons to agree with the *Hamidi* majority, at least insofar as it refused to extend the doctrine of cyberproperty to protect the owners of *chattels*. In other words, Easterbrook may have been right that there is a place for new property-like rights "in cyberspace" generally.[186] According to Fairfield, however, locating those property rights exclusively in the hands of chattel owners is not efficient.

Fairfield also carefully limits his claim to online resources that are coded as "rivalrous," meaning that they will not have value when possessed by multiple parties.[187] While this is true of domain names (an address is not valuable if it is shared), the information on a typical website does not satisfy Fairfield's requirement. With regard to typical information resources, a broader critique is to be made of the dubious benefits of privatization.

One can find the critique of privatizing digital information, oddly enough, coming from within the Chicago school. Saul Levmore, the current dean of the University of Chicago Law School, recently noted that the entire Demsetzian story of privatization might be viewed with justifiable skepticism, telling a story of capture by private interests rather than a story about the natural evolution toward efficiency.[188] Even if the claims of Demsetz were descriptively valid with regard to the historic evolution of private property rights in land, information resources are likely to work in different ways than land resources.[189] Just as, according to Blackstone, land and water should be treated by different legal

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185. *Kremen*, 337 F.3d at 1026-27.

186. Easterbrook, *supra* note 152, at 210-12.

187. Fairfield, *supra* note 2, at 1052-53.

188. Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 188-89 (2003) ("[T]he picture is much less sanguine than the one usually painted with the commons receding in the background and hard-working tillers of land dominating the foreground."); *see also* Goodman, *supra* note 23, at 278 (describing the difficult debates over whether property is a fit model for the use of electromagnetic spectrum); Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857, 1868 (2000) (describing how interest group capture rivals Demsetzian spontaneous evolution as a theory explaining the historic creation of new property laws).

189. Arguably, one can also see this trend away from (blunt) property rights in intellectual property law. *See* Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, Nov. 28, 2005, http://ssrn.com/abstract=855244; Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 92 (2004) (describing how copyright has transitioned from a property rights regime toward a regulatory regime); Merges, *supra* note 188, at 1875 (explaining contemporary reactions against the 'statutorification' of intellectual property law).

regimes, the optimal structure of software and information regimes are likely to be somewhat different.[190]

Many claims of cyberproperty would seem to assume that the information and computer code present on networked systems can be made more socially beneficial through the creation of legal regimes of exclusion. Yet with regard to the best resource model for software development, Levmore calls "appealing" the claim that non-proprietary models enable more efficient production and have been responsible for "sustained and impressive innovation."[191] If one couples these impressions with Fairfield's arguments, it would seem hardly a radical notion that we might do well to be skeptical of any blind faith in the efficiency of new cyberproperty rights placed in the hands of chattel owners.[192] One might find an "anti-commons" property regime emerging in cyberspace, but one need not do so in order to reject calls for the expansion of trespass to chattels doctrine.[193] One simply need question the original conviction that privatizing valuable resources is always the best way to achieve social progress.

All privately created value does not merit the label of property.[194] When Judge Easterbrook spoke, there seemed to be a conventional wisdom among those who set Internet policy that the law was far too lax in creating and

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190. The obvious economic issue with the generation of cyberproperty rights is the increased transaction costs created by legal entitlements and the resultant decrease in greater network benefits that stem from free information flow—this issue was noted by the court in *Hamidi*. Intel Corp. v. Hamidi, 71 P.3d 296, 310-11 (Cal. 2003). But there are many other significant economic angles one might use to critique cyberproperty enthusiasm. The works of Henry Smith and Brett Frischmann are particularly enlightening in trying to think through cyberproperty economics. Smith's work reveals the complexity of the issue and some of the shortcomings of common economic assumptions. *See* Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 71, 97-101 (2005). Frischmann's work is more directly relevant to the economic debates. Explaining the economic dimensions of infrastructures and commons, Frischmann challenges common assumptions associated with faith in privatization as a remedy. *See, e.g.*, Frischmann, *supra* note 135, at 919, 926-27 (explaining the benefits of open access to certain resources); *id.* at 928 (stating that information and Internet resources are examples of nontraditional infrastructure resources).

191. Levmore, *supra* note 188, at 185.

192. Frischmann, *supra* note 135, at 936 (advocating, from an economic efficiency perspective, for open access regimes with regard to Internet infrastructure resources).

193. Dan Hunter has argued that expansive cyberproperty rights will create an anti-commons arrangement. *See* Hunter, *supra* note 4, at 439. On the concept of the anti-commons generally, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 675 (1998).

194. *See* INS v. Assoc. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("[T]he fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property."). Of course, further complicating this is the fact that the law inevitably creates value when it recognizes a thing as property—leading to the traps of tautological reasoning. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

protecting property rights on the Internet. Policymakers believed that if new and strong online property rights were not created, the Internet would prove to be a barren wasteland.[195] Yet the resulting years have shown that in the absence of strong property protections, the Internet has become socially productive in ways that have transformed society and defied any conventional economic wisdom.

As David Post said five years ago, "[C]yberspace keeps growing and growing; more and more stuff keeps appearing in new guises and new shapes; there are more and more people trying to give me information to place in my computer than I have room for."[196] This description seems equally apt today. In the absence of cyberproperty rights, the feared tragedy of the commons in cyberspace has turned out to be largely a comedy, disproving the conventional Demsetzian wisdom of the need for privatization.[197] As David Post once summarized the problem, perhaps we need to restrain the urge of law-makers and legal scholars to "fix" things that are not broken. And perhaps we should be doubly hesitant when those people most eager to do the fixing are those most committed to theories that the unbroken things are disproving.[198]

Before moving on to the next section, I should emphasize that this discussion of cyberproperty's "law and economic" moorings is being offered mainly to show that, even within the circles of those who have faith in the explanatory power of Demsetzian theories, the case for cyberproperty is extremely weak. With that said, it is worth noting that not everyone shares the faith of Demsetz in the virtues of privatization. The "property" component in cyberproperty generally purports to be based on one flavor of economic analysis that, when closely considered, does not generally support the case for cyberproperty.[199] Yet by emphasizing this shortcoming, I risk implying that some more sophisticated form of law and economics reasoning ought to dominate debates over cyberproperty. This is certainly not my belief. Indeed, the stakes at risk in the regulation of information networks include numerous rights and human values that are hard to reconcile with the purely economic analysis of law. Rights-based and humanistic approaches to property law, for instance, are often in tension with Chicago School reasoning.[200] I give primary emphasis here to the fallacies of

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195. David G. Post, *His Napster's Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35, 49 (2001).

196. *Id.* at 43.

197. *See generally* Rose, *supra* note 135, at 717-20.

198. *See* Post, *supra* note 195, at 43.

199. *See* Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 16-18 (2006) (explaining how Demsetzian theories seem generally inappropriate when applied to the regulation of avenues of commerce and communication).

200. Economics can certainly be a useful tool for legal policy-making, but it is well understood that economic analysis fails miserably when it is offered as a totalizing framework for legal discourse. *See, e.g.*, Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 352 (2005) ("Responsible economic theorists recognize that defining a social utility function always requires a priori resolution of certain normative questions."); Kimberly Kessler Ferzan, *Some Sound and Fury from Kaplow and Shavell*, 23 L. & PHIL. 73, 102 (2004) (explaining how

cyberproperty within the standard Chicago School thinking in order to demonstrate how, even on cyberproperty's "home turf," its logic fails. When considered outside its home turf by those who would resist the vision of Demsetz, enthusiasm for cyberproperty is even more suspect.[201]

B. Decoding "Code is Law"

In the past section of this Article, I explained that cyberproperty proponents err by assuming that "cyberproperty" is not significantly different than land for the purposes of legal regulation. Instead, computer resources may constitute an exceptional type of legal object, making the extension of the laws of real and chattel property to their protection ill-advised. This section argues against a second type of exceptionalism. The concern is that, to some extent, cyberproperty proponents rely upon the well-known argument (well-known in cyberlaw circles, at least) that "code *is* law."

"Code is law" is popularly associated with law professor Lawrence Lessig, and particularly with his 1999 book *Code and Other Laws of Cyberspace*.[202] As Lessig acknowledges, however, the idea was initially sketched in another book, *City of Bits*. *City of Bits* was written in 1995 by William Mitchell, Dean of the School of Architecture and Planning at the Massachusetts Institute of Technology.[203] In his book, Mitchell attempted to generally describe the digital "architectures" created in cyberspace.[204] Mitchell suggested that "on the electronic frontier, code is the law."[205]

City of Bits was an influential text in the cyberlaw community—within a few years of its publication, legal scholars including Lessig, Ethan Katsch, Joel Reindenberg, and James Boyle were busy grappling with the implications of code replacing law.[206] However, it was Lessig's book that provided the most thorough

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welfare theories premised on economic reasoning fail to explain criminal law, which is premised on, among other things, principles of fairness).

201. *See, e.g.*, Cohen, *supra* note 134 (challenging the desirability of grand theories of cyberspace); Margaret Jane Radin, *A Comment On Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23, 38-39 (2006) (commenting on the *Hamidi* case and suggesting that competition and free speech policy should play a greater role in debates over information propertization).

202. LESSIG, *supra* note 7, at 6 ("*Code is law.*" (emphasis in original)).

203. *Id.* at 6, 241 n.7 ("In much of this book, I work out Mitchell's idea. . . ."); WILLIAM MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN (1995).

204. Hunter, *supra* note 4, at 442, 455, 500 (using Mitchell's work to inform arguments about the spatial claims made of cyberspace).

205. MITCHELL, *supra* note 203, at 111.

206. *See, e.g.*, James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997); M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335; Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911 (1996); Joel R.

investigation of the concept and brought the notion that "code is law" to prominence among legal scholars. The impact of "code is law" among some legal scholars has been substantial. Professor Polk Wagner, for instance, has stated that "code is law" is the "most significant principle to emerge from the academic study of law on the Internet."[207]

Yet, despite the importance of the concept, many commentators seem less than sure what "code is law" means.[208] Those who endeavor to explain the slogan, in fact, generally describe the claim as its opposite—that code is *not* law, but something as powerful and significant as law.[209] A quote from Anupam Chander exemplifies how "code is law" is most commonly framed by those familiar with Lessig's writing: "As Lawrence Lessig informs us, markets, architecture, and social norms can regulate behavior, sometimes as well as or better than law."[210] So, in other words, code (the word "architecture" stands in for "code" in the previous sentence) is like law, but opposed to law. In a later summary of his intent, Lessig explains that he meant the equation of code and law as a poetic provocation.[211] He states: "[C]ode controls behavior as law might control behavior: You can't easily rip the contents of my DVD because the code locks it tight. The code functions as a law might function: Telling the user what she can and cannot do."[212]

Yet while locks and laws control behavior, locks are, of course, not laws. As James Grimmelmann explains, "code is law" is, therefore, a somewhat misleading slogan.[213] For Lessig, code is digital "architecture" that does the work of law, but is not law, *qua* law.[214] Most scholars working out "code is law" concepts today, such as James Gibson, James Grimmelmann, Polk Wagner, and Tim Wu, agree with Lessig that code is challenging legal ordering.[215] Yet they

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Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998).

207. Wagner, *supra* note 2, at 459.

208. *See, e.g.*, Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 369-71 (2003) (analyzing the meaning of the phrase); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1195-96 (2000) (arguing that if code is law, so are airports); Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 681 (2003) (stating that "what this really means remains extremely vague").

209. For instance, Polk Wagner generally stresses the operative *differences* between law and software as modalities of regulation, noting how law and software are *not* equivalents. Wagner, *supra* note 2, at 459, 461, 474.

210. Chander, *supra* note 164, at 773 (citing LESSIG, *supra* note 7, at 87).

211. *See* Lawrence Lessig, Symposium, *Cyberspace and Privacy: A New Legal Paradigm? Foreword*, 52 STAN. L. REV. 987, 990 (2000).

212. *Id.* ("I meant ["code is law"] originally in a metaphorical sense. . . .").

213. Grimmelmann, *supra* note 12, at 1727. Grimmelmann notes that the phrase, while "pithy," has forced many who have benefited from Lessig's insights to rhetorically reject his equation. *Id.*

214. *Id.* at 1721, 1726.

215. *See, e.g.*, James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163 (2004);

mostly distance themselves from the phrase "code is law" by stating that code is actually *not* law—which, it turns out, is what Lessig was saying.

Scholars might ask, then, given the sophistication of his discussions of the interplay of code and law, why Lessig decided to emphasize the misleading slogan "code *is* law" when he actually saw code as something that threatened to undermine the rule of law.[216] There are several good reasons why Lessig pushed "code *is* law," but the most obvious answer is the political context in which *Code* was written. Lessig wanted his readers to take his claims about the threats posed by the unconstrained social regulatory powers of software more seriously. His "code is law" rhetoric was a rhetoric designed with a particular political agenda in mind and a particular audience. Conflating code and law created a challenge to certain important political stakeholders.

If code became law, the legislature and judiciary would perceive that their social power—the power of law to control society—was slipping in favor of the "coded" regulatory powers of companies like Microsoft and America Online. Another audience would also be disturbed by the equation: so called "cyber-libertarians" who believed that the best course of future action would be to keep the state away from cyberspace and to promote the freedom of technological power. Lessig thought this faith in the libratory power of the "invisible hand" of markets and technology was, at base, naïve.[217] He feared that a society governed largely by computer code and markets would ultimately fail to reflect the constitutional commitments found in our democratic system of government.[218]

Lessig hoped that, by challenging both the government and the entrenched cyber-libertarians with "code is law," he might convince them to be more proactive with lawmaking in response to the social transformations brought about by the Internet.[219] The power of law, he hoped, might counteract the perceived anti-democratic and unconstrained effects of software regulation, "reading the constitution onto cyberspace," so to speak.[220]

So "code *is* law" rather than "code is *not* law" was part of a calculated rhetorical move to throw two parties in each other's conceptual orbits. For many, this actually worked: an impressive feat in a book that was both informative and entertaining. *Code* led the typical reader to realize that the choice confronted was not between sovereign or no sovereign, but between the sovereignty of

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Grimmelmann, *supra* note 12; Wagner, *supra* note 2; Wu, *supra* note 208.

216. *See* Lessig, *supra* note 133, at 543 ("Law, I have argued, is vulnerable to the competing sovereignty of code. Code writers can write code that displaces the values that law has embraced. And if the values of law are to survive, law might well have to respond."); Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 1 (2003) [hereinafter Lessig, *Law Regulating Code*] (looking at how "law and technology interact").

217. LESSIG, *supra* note 7, at 234.

218. Lessig's views on this were put most succinctly in his concluding chapter, "What Declan Doesn't Get," where he criticized journalist Declan McCullaugh for failing to see the danger of completely removing the government from technological regulation. *Id.* at 231-34.

219. *Id.*; Gibson, *supra* note 215, at 196-97.

220. Lessig, *supra* note 211.

government or the sovereignty of technological power. *Code*, unlike the majority of books published by legal scholars, was enthusiastically received, reviewed, and praised far outside the traditional confines of the legal academy. It certainly shaped the way many people think about the Internet and law today, and it captured and articulated some of the central features that make cyberlaw and cyberspace unique.[221]

Yet, while I am comfortable praising *Code*, there are a few things about it that actually explain, I think, the expansion of cyberproperty. *Code* can be read as a fairly exceptionalist account of the social impact of particular technologies, and, in particular, an exceptionalist account that seems very comfortable with language that describes cyberspace as a "place" or "space."[222] There are really two issues here: the first is that the insistence in *Code* that cyberspace is a "space" rather than an automated process of information exchange. The "spatial" metaphors in *Code* are, as Dan Hunter notes,[223] entirely consistent with the zeitgeist when it was written, but they tend to lead to a conflation of cyberspace with spatial property. This, in turn, is used as support for claims of cyberproperty, a phenomenon discussed in the preceding section.

The second issue is the trope found in *Code* of equating the power of code with the power of law. Lessig's stated goal of replacing the "architectural" rules that flow from markets and technology with more democratically-oriented legal rules,[224] combines synergistically with the first issue to make cyberproperty doctrines seem like an appealing innovation. Rather than having non-democratic technology and the unconstrained power of markets regulating new spaces, *Code* can be read to suggest that we should look to new legal property rights to promote efficiency and justice.

To make my concern more clear, one should consider the brief treatment in *Code* of "trespass law in cyberspace."[225] Lessig states that Harold Reeves, his former research assistant, proposed to him that "'owners' of space in cyberspace" should have "no legal protection against invasion."[226] Reeves argued that instead, those wishing to protect "cyberspace" holdings should be required to rely on technologies of exclusion. Lessig's reaction was that Reeves's idea was "a bit nutty, and in the end, I think, wrong."[227]

Consistent with his thesis in *Code*, Lessig advocated for the deployment of law as an ordering mechanism in this instance. He analogized the issue to the problem of a farmer wishing to protect land. The choices, he said, were between

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221. *See, e.g.*, LESSIG, *supra* note 7, at 11-13 (discussing virtual worlds).

222. *See generally* Cohen, *supra* note 134 (criticizing cyberlaw scholars for failing to grapple with the complexity of space and place).

223. Hunter, *supra* note 4, at 442-44.

224. LESSIG, *supra* note 7, at 233-34.

225. *See id.* at 122-24.

226. *Id.* at 122.

227. *See id.*; *see also* Harold Smith Reeves, Comment, *Property in Cyberspace*, 63 U. CHI. L. REV. 761 (1996).

private fences and laws.[228] According to Lessig, the correct solution would not depend wholly upon technology, but would mix some degree of private fencing and some degree of trespass law. "From a social perspective," said Lessig, "we would want the mix that provides optimal protection at the lowest cost."[229] This sounds rather close to the recent arguments of Patricia Bellia and Polk Wagner for the merits of cyberproperty regimes.[230]

Though Lessig's more recent statements indicate that he opposes the expansion of cyberproperty,[231] the above passage from *Code* seems to animate some contemporary arguments for cyberproperty. If technological blocking is tantamount, via "code is law," to a legal right to exclude, then perhaps it would be wise to consider a legal regime of property-based exclusions as an alternative to technological power.[232] Perhaps, as Lessig said earlier, some mix of legal and technological exclusion rules might be the optimal way to approach trespass law in cyberspace.[233]

We should, of course, consider whether the law should respond to new technologies. With regard to technologies of network exclusion, the law can provide a multitude of different responses: it might offer legal alternatives to the powers of exclusion, it might legally prohibit technological exclusion, or it might ignore the new technological power altogether. We cannot simply presume that one of these options is the correct course of action from the standpoint of optimal policy. Law and technology dance together in complicated ways, and they have been doing this dance for a long time.[234]

Cars, for instance, are not laws. Car ownership gives the owner the technological ability to drive quickly and endanger the lives of others. However, the law intrudes, to curb the right to exercise technological power (via speed limits), to regulate who can exercise that power (by licensing), and to provide special civil penalties for failing to follow social directives regarding the use of the power (e.g. driving while intoxicated).

The battles between legal power and technological power began long before the creation of the Internet or the automobile.[235] Inventions are often sources of

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228. LESSIG, *supra* note 7, at 122.

229. *Id.*

230. Bellia, *supra* note 2, at 2194; Wagner, *supra* note 2, at 496-98.

231. LESSIG, *supra* note 87, at 170 ("[W]hile my bias is with Burk, I don't mean to deny the plausibility of a different regime."); Lemley, Brief in Support of Appellant, *supra* note 86.

232. Bellia and Wagner both acknowledge that law might be used to disable some blocking efforts, but both concentrate primarily on correlating law with technologies of exclusion, not intrusion. *See* Bellia, *supra* note 2; *see also* Wagner, *supra* note 2.

233. This argument has been recently echoed by Wagner. *See* Wagner, *supra* note 2, at 498 (arguing for "more law and less software").

234. As Julie Cohen notes in a forthcoming article, cyberlaw scholars stand to benefit from a deeper partnership with science and technology (STS) studies, which investigates the social and historical impact of technological artifacts from a sociological perspective. *See* Cohen, *supra* note 134, at 39-41.

235. Richard A. Epstein, *Before Cyberspace: Legal Transitions in Property Rights Regimes*,

new laws, both common and statutory.[236] New technologies confront society with questions of whether the shifts in power they create should be left unchecked or should be "remedied" by the state as a regulator. Indeed, we might go as far back as Hobbes, Bentham, or Locke (or beyond) to investigate the interplay of law and technology. The state itself, arguably, is merely a response to what would be default or "natural" technological orderings.[237] Justice Cardozo remarked, in an earlier day, about how the steamship, the telegraph, and the telephone had all changed both society and the law.[238]

However, in *Code*, Lessig seemed intent, for reasons described above, on setting code apart and resisting the conflation of code with other more "primitive" technologies.[239] Lessig suggested that the architecture of code was somehow qualitatively new.[240] At one point, he suggested that his argument was at risk if the reader thought the technology of code was similar to the technology

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73 CHI.-KENT L. REV. 1137, 1153-54 (1998) ("The question of whether new technology requires alteration of old rules is itself an old question that is insufficiently studied. It is not a new question that requires us to start from scratch."). I should emphasize that Lessig's own work is consistent with this. In his articles and books, Lessig often offers anecdotes about the history of technological transformations as entry points in order to view current cyberlaw problems—he clearly appreciates the similarity of computer code and other technologies. *See, e.g.*, LESSIG, *supra* note 7, at 92 (discussing speed bumps); *id.* at 111 (discussing the telephone).

236. *See generally* Epstein, *supra* note 235; *see also* Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1333 (1996) ("Unquestionably, new technologies challenge legal paradigms."); Epstein, *Cybertrespass*, *supra* note 2, at 75 (noting how new technology changes law); Michael L. Rustad & Thomas H. Koenig, *Cybertorts And Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 77-78 (2003) (noting a 1936 article in *Law and Contemporary Problems* describing how the common law of torts was adapting to the invention of the automobile).

237. In his argument for legal recognition of online property, I. Trotter Hardy characterizes Bentham as claiming that law operates in this way. *See* Hardy, *supra* note 2, ¶ 31.

> [B]entham was concerned that absent a law of property, individuals would try to use technological means (locks, guns, fences, etc.) to protect what they had amassed. It would be this sense of technological ownership that would be subject to a sense of insecurity because superior technological force could always overcome it. Legal protection would provide the security and sense of ownership that these technological means could not provide.

Id. Of course, it isn't clear how the technology of the gun differs from the "technology" of the stick and stone—hence we could draw these thoughts about law and technology all the way back to questions about law and the state of nature. Regarding the theories of Hobbes and Locke, *see* Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL'Y 1 (2005) (discussing how theories of law make presumptions about potentials for human behavior in the state of nature.)

238. CARDOZO, *supra* note 1, at 61.

239. LESSIG, *supra* note 7, at 19-20 (stating that regulation in "Avatar space" is special).

240. *Id.*

of airplanes.[241]

The early history of the airplane, however, is a wonderful story about the interplay of technology and law. Much like the early Internet, aviation saw substantial government involvement—and military involvement especially. The first extended manned flight of an airplane took place on December 17, 1903.[242] Less than five years after Kitty Hawk, the first U.S. military aviation casualty occurred when Orville Wright crashed his plane in a demonstration at Fort Myer, injuring himself and killing Lieutenant Thomas E. Selfridge of the U.S. Signal Corps.[243] The next year, the Wright brothers were awarded a military production contract.[244]

In 1915, the United States National Advisory Committee for Aeronautics (the ancestor of NASA) was established in order to federally promote the progress of aviation science.[245] By this time, small scale commercial air service had begun in the United States. Military warplanes were also in combat use across the European theatre.[246] Lawyers tagged right along with these developments. State legislatures quickly began to regulate the technology and practice of air travel. In 1921, less than two decades after Kitty Hawk, the legal regulation of the air had progressed far enough that Justice Cardozo, in *The Nature of the Judicial Process,* remarked upon a "body of legal literature that deals with the legal problems of the air."[247]

Five years later, and just a little more than two decades after Kitty Hawk, the Air Commerce Act of 1926 established comprehensive federal regulation for the new technology, which evolved, over time, into the regulatory apparatus we know as the Federal Aviation Administration.[248] Aviation regulations now proscribe the technology of mechanized flight in minute detail.[249] While notions of striated airspace, licensing, and mandatory technologies may seem like common sense arrangements today, the policy of airplanes evolved through a

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241. *Id.* at 221 (stating that he expects lawyers to object that "[c]ode is not law, any more than the design of an airplane is law").

242. T.A. HEPPENHEIMER, A BRIEF HISTORY OF FLIGHT: FROM BALLOONS TO MACH 3 AND BEYOND 51-53 (2001). As Heppenheimer's book demonstrates, the work of the Wrights really deserves to be placed in a much longer history of aeronautic aspirations and attempts (including those of Cayley, Lilienthal, and Langley)—but since this is a brief digression, only Kitty Hawk will be mentioned.

243. HERBERT A. JOHNSON, WINGLESS EAGLE: U.S. ARMY AVIATION THROUGH WORLD WAR I 29 (2001).

244. GRETCHEN WILL MAYO, THE WRIGHT BROTHERS 33 (2003).

245. PATRICK EVANS-HYLTON, AVIATION IN HAMPTON ROADS 61 (2005).

246. *See* THE AEROSPACE ENCYCLOPEDIA OF AIR WARFARE: VOLUME ONE 1911-1945, at 7-10 (1997).

247. CARDOZO, *supra* note 1, at 61; *cf.* Kerr, *supra* note 208, at 387 (noting that the problem of analogical reasoning with regard to technology is not specific to the Internet and discussing Justice Cardozo's opinion in *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

248. Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926).

249. *See generally* 14 C.F.R. § 1 (2006).

process that demanded considerable judicial creativity. As property scholar John Cribbet has noted, however, there was nothing simple about the interplay of law and aviation technology.[250] "[A] wholly new concept to respond to developing technology" was required, one that looked to a "broader social-framework."[251]

This is what we have seen so far in the path of cyberlaw. An ever-growing body of software-specific federal and state legislation is being created in response to the spread of computer networks and software technologies; state laws lead and federal laws attempt to harmonize state experiments. For instance, computer hacking legislation was enacted long before "cyberlaw" *per se* was recognized as a legal subject.[252] The Department of Justice added a division specifically tasked with addressing computer crimes[253] at roughly the same time William Mitchell published *City of Bits*.[254] Today, cyberlaw casebooks cut across a wide variety of disciplines: intellectual property, speech torts, computer viruses, computer hacking, personal jurisdiction, and electronic contracting. "Spam," the bane that, in part, gave birth to cyberproperty, is the subject of targeted legislation.[255] It is safe to assume that cyberlaw in the future will continue to grow in size and significance, responding to the escalating power and social distribution of digital technologies.

In his most recent book, *Free Culture*, Lessig leads with a story about how airplanes changed the common law—and the law of trespass in particular.[256] Lessig notes how the U.S. Supreme Court, in *United States v. Causby*,[257] eviscerated an ancient maxim of real property trespass law—the ownership of land from the depths to the heavens—in light of the social benefits provided by airplanes.[258]

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250. John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1.

251. *Id.* at 20-21.

252. *See* Kerr, *supra* note 32, at 1602 ("Computer crime statutes were first enacted in the late 1970s in response to perceived failures of preexisting laws to respond to computer misuse."); *see also* Susan W. Brenner, *State Cybercrime Legislation in the United States of America: A Survey*, 7 RICH. J.L. & TECH. 28, *15 n.37 (2001), *available at* http://law.richmond.edu/jolt/v7i3/article2.html (listing state computer trespass laws).

253. The division has a web page. *See* United States Department of Justice, *Computer Crime & Intellectual Property Section*, http://www.usdoj.gov/criminal/cybercrime.

254. *See* Michael Coblenz, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 242 (1999).

255. *See* Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003), Pub. L. No. 108-187, 117 Stat. 2699 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., 28 U.S.C., and 47 U.S.C.); Lemley, *supra* note 4, at 541.

256. LAWRENCE LESSIG, FREE CULTURE 1-3 (2004).

257. 328 U.S. 256 (1946).

258. *Id.* at 260-61; LESSIG, *supra* note 256, at 1-3. In particular, Lessig explains that Justice Douglas, in *Causby*, 328 U.S. at 260-61, rewrote the maxim: "*cujus est solum, ejus est usque ad coelum et ad inferos*," which means, "Whosoever owns the land, owns to the sky and to the bottom of the earth." Thus, "[i]n a single sentence, hundreds of years of property law were erased,"

So in the *Causby* story, we have a new technology, the airplane, rewriting the law of trespass. What was formerly understood as trespassory is now, with the adoption of new technology, understood as non-trespassory.[259] Though Lessig does not note it, this story is the inverse, in many ways, of the arguments that are made for the creation of cyberproperty rights.

The proposition that code is simply this generation's socially disruptive technology *du jour* does not seem like much of a concession to demand from cyberlaw scholars. Indeed, it lends some promise that the enterprise of cyberlaw has roots in something deeper than the heady turmoil of the past ten years, which included a certain Internet stock bubble. If we see cyberlaw as an attempt to build an academic discourse around the way law responds to technological pressures and is shaped by technological change, we obtain a wealth of *Causby*-like precedents to draw upon.

In the context of cyberproperty, there is a particular danger in not seeing the connection between the interplay of law and code and the interplay of law and prior technologies. The equation of code with something "natural" was something that Lessig seemed intent on resisting in *Code*, for legitimate reasons.[260] His fear was that such an approach would lull the public into an unwise complacency about a *status quo*. But with regard to cyberproperty, "code is law" rhetoric, when combined with cyberspace rhetoric, may actually make us overzealous with attempts to "fix" what is perceived as technology run rampant over legal ordering.[261]

David McGowan and Richard Epstein have both endorsed language by the intermediate appellate court in *Hamidi* that suggested the denial of an injunction to Intel simply perpetuated "a wasteful cat and mouse game."[262] But if the law takes any given cat and mouse game seriously enough to intervene, it must ultimately choose between cats and mice—and the law is not always able to do this confidently. In such cases, we often leave new technologies alone, and the cats and mice are left to the survival of the fittest.

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divesting landowners of their property rights in favor of the public interest in air travel. *Id.* at 2. This point about airplanes has been a popular one. *See* Epstein, *Cybertrespass*, *supra* note 2, at 75 (explaining the economic sensibility of this divesture); Levmore, *supra* note 188, at 192 (same). I rely on Epstein's translation of the maxim.

259. As Larry Solum has noted, Lessig's description of what happened in *Causby* is actually a bit off in some ways, but is correct enough where it matters. Lawrence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137, 1444 (2005) (reviewing LESSIG, *supra* note 256); *see also* This Is Very Funny (Nov. 9, 2005, 6:15 EST), http://www.lessig.org/blog/archives/003202.shtml (Lessig responding to claims that he misrepresented the import of the case in his book).

260. LESSIG, *supra* note 7, at 6 ("Code is never found; it is only ever made, and only ever made by us.").

261. *Id.*

262. Epstein, Intel v. Hamidi, *supra* note 2, at 151 (calling this "right on the money"); McGowan, *The Trespass Trouble*, *supra* note 2, at 123; *cf.* Wagner, *supra* note 2, at 497 (favoring the creation of a new cyberproperty right because the current state of affairs is "complex, uncertain, and unstable").

In any given cat and mouse game, the mouse possesses a technology of escape and the cat possesses a technology of capture. By failing to intervene in the affairs of cats and mice, the law is refusing to take sides in the game. If something is "wasted" by the law's lack of intrusion, it is not clear who has the superior right to complain of this waste? Is it the cat or the mouse? Should the law step in to "fix" it by de-clawing cats? Should it force mice to lie down on dinner plates? Ronald Coase once explained that property claims always involve two parties who can structure their entitlements in various ways.[263] The problem for the law is not in seeing that there is a conflict, but in knowing where the optimal entitlement should lie or if it should lie at all.[264] Just because we can identify, in technologies of website exclusion, two "powers" that are at odds, that does not mean that this is a "problem" that the law is suited to fix.[265]

To their credit, *Hamidi* critics and cyberproperty proponents Patricia Bellia and Polk Wagner do not ultimately come down firmly on the side of either cats or mice—meaning, in this case, cyberproperty owners and putative "trespassers."[266] They recognize that, in some instances, the law should favor the trespassers and send the cats away.[267] Bellia cautiously advocates for some "technology-displacing" laws.[268] Wagner puts this in a different way, calling for the consideration of "legal preemption," which he explains is the "direct [legal] control of software-regulatory effects."[269]

But from a doctrinal perspective, the arguments of Bellia and Wagner for *inversions* of the exclusionary rights associated with cyberproperty seem a bit strange. The very doctrinal premise of cyberproperty, as explained in Part I,

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263. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

264. *See, e.g.*, Mark Kelman, *Taking* Takings *Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1840-43 (1986) (reviewing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)) (discussing the problematic implications of Coasian reasoning for traditional liberal theorists).

265. At the same time, it does not mean that the law should always stand idly by—the only point here is that the mere presence of a conflict over outcomes does not always amount to a justification for legal intervention. I am grateful to David McGowan and Mike Madison for pressing me on this point.

266. *See* Bellia, *supra* note 2, at 2273; Wagner, *supra* note 2, at 463.

267. *Accord* Gibson, *supra* note 215, at 171-72. Professor Gibson argues for "technolegical" responses to potential new laws protecting databases. Like Bellia and Wagner, Gibson is exploring the creation of technology-limiting rules as a means to address the usurpation of law by coded regulation. *See id.*

268. Bellia, *supra* note 2, at 2273. In fact, Bellia argues that the legal right to penetrate technological barriers is the "logical conclusion" of the "anti-enclosure" position regarding cyberproperty. *Id.* at 2194. In addition, Bella states that, "To achieve an appropriate balance among the competing interests at stake in cyberproperty claims, we should look to a rule that demands adequate notice of the conditions of access and backs those conditions with property-rule protection, but is limited where necessary by technology-displacing rules." *Id.* at 2273.

269. Wagner, *supra* note 2, at 463. James Gibson might label these anti-cyberproperty "technolegical" proposals. *See* Gibson, *supra* note 215, at 167-70.

resembles an argument for a private property right under the doctrine of trespass to chattels. To turn that doctrine on its head is an interesting aspiration, but how, at least under that cyberproperty doctrines, might a court deny a website or server "owner" the right to block incoming emails or to prevent visitors from getting access to files on a server? What is the criterion? The openness of Bellia and Wagner to notions of "technology-displacing law" and "legal preemption" goes a long way toward making their positions palatable to those who favor open access regimes, but it makes Bellia and Wagner, to some degree, not cyberproperty advocates, but simply advocates for some regulatory involvement in online access rights.

Their entertainment of legal trespassing rights also places Bellia and Wagner at a considerable ideological distance away from the dissenting justices in the *Hamidi* case. Undoubtedly, a jurist agreeing with the dissenting opinion of Justice Brown would have a hard time justifying the prevention of cyberproperty "owners" from using exclusionary technologies to protect their putative cyberproperty assets. This would not be merely "licens[ing] a form of trespass," but legally *mandating* it.[270]

Cyberproperty arguments are thus dependent upon two claims: the effectiveness of a freely exercised technological power *and* a faith in the normative correctness of the free exercise of that power. In other words, there is not just a sense of a wasteful cat and mouse game, but a conviction that the cats (the owners of digital computing equipment) should always win.

The analogy to a farmer's fence, originally used by Lessig in passing, is worth returning to. We should see that what makes this argument seem cogent is that the (cyberspatial) fence is, in the reader's mind, surrounding some (cyberspatial) farm. When we start with the notion that cyberspace is analogous to a land filled with private farms and farmers, a law granting the farmers an absolute right to exclude, either by fences or by law, does not seem very far beyond the pale. The notion of weighing legal and technological utility, appears, in that context, highly appropriate.

But stop a second and note: the appropriateness of cyberproperty in this analogy is not dependent upon our feelings about the fence (the code), but upon our intuition about the farm (the property). If a farmer's fence were placed somewhere else in the analogy, such as in the middle of a four-lane highway, or floating in the ocean or in the surf on a beach, or even on someone else's land—our confidence in the wisdom of providing legal alternative to the fence's exclusionary powers would disappear.

A farmer's fence is not a law, in other words, it is merely a technology. The technology of a fence can protect property, but it does not create a property right by itself. The power of a fence, like the power of code, is therefore importantly different than the power of law.

Code should not be confused with law. It is ironic that Lessig's rhetoric, which aspired to avoid this conflation, has played a role in enabling it.

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270. Intel Corp. v. Hamidi, 71 P.3d 296, 316 (Cal. 2003) (Brown, J., dissenting) (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736-37 (1970)).

C. Cyberproperty's Statutory Cousins

In the prior two parts of this Article, I questioned two of the assumptions that seem to drive arguments for cyberproperty: the belief that the code on networked computers is akin to traditional forms of property and the belief that code is exceptionally law-like. While these beliefs have animated the development of cyberproperty, they have also had influence on other areas of cyberlaw. The dangers of "code is law" and "code is property" are not limited to the issue of common law trespass to chattels. The confusion they represent permeates into other areas of law as well.

If one wishes to find statutory analogies to cybertrespass claims, the best statutory foil is the Computer Fraud and Abuse Act ("CFAA").[271] But comparing the CFAA to cyberproperty raises complex issues of statutory interpretation.[272] The relationship between common law cyberproperty and statutory foils can perhaps be better illuminated by discussing a case related to another statutory cousin of cyberproperty: the "anti-circumvention" provisions of the Digital Millennium Copyright Act ("DMCA").[273]

These provisions of the DMCA ban the distribution and use of digital tools in order to, among other things, "circumvent a technological measure that effectively controls access to a work protected under this title."[274] Like the CFAA, the DMCA can be understood to legally reify a technology of exclusion, prohibiting the circumvention of measures that effectively control access. And (again like the CFAA) the history of the DMCA reflects a similar belief by legislators found with regard to judges in cyberproperty cases that computer code can create a type of digital "space" and a type of exclusionary privilege that makes analogies to trespass to real property justified.[275]

This is illustrated in the well-known DMCA case of *Universal City Studios, Inc. v. Corely*.[276] The case was initiated when several movie studios challenged the distribution of a decryption program, DeCSS, by "hackers" (as in *Thrifty-Tel*) who were using the algorithm to decrypt DVDs. The studios sought an

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271. *See* Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000); Hunter, *supra* note 4, at 483 (stating that trespass to chattels and computer trespass statutes are treated "interchangeably"); Wagner, *supra* note 2, at 498 (listing the CFAA and trespass law as two doctrines supporting the cyberproperty right). The legislative history of the CFAA, beginning in the early 1980s, abounds with the same rhetoric of virtual spatial invasion that is found in cases defending cyberproperty rights. Madison, *supra* note 4, at 478-85 (explaining the history and purpose of the CFAA).

272. Helpful discussions of the CFAA that touch on its relation to cyberproperty rights can be found in Bellia, *supra* note 2, at 2167; Hunter, *supra* note 4, at 475-83; Kerr, *supra* note 32, at 1616, 1633; Madison, *supra* note 4, at 478.

273. 17 U.S.C. § 1201 (2000); Burk, *supra* note 23, at 21.

274. *Id.* § 1201(a)(1)(A).

275. Madison, *supra* note 4, at 434-35.

276. 273 F.3d 429, 445 (2d Cir. 2001) ("Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code.").

injunction against the distribution of the code, alleging that it violated the provisions of the DMCA described above.[277] The defendants relied on prior decisions equating software with speech and argued that the First Amendment protected their distribution of the decryption code.[278]

The Second Circuit agreed that computer code could be classified as speech.[279] The panel still upheld the injunction, however, on the basis that First Amendment protections for speech in code would need to be less broad, because computer code "combin[es] nonspeech and speech elements, i.e., functional and expressive elements."[280] In support of the variant First Amendment standard for code, the Second Circuit cited to a prior Supreme Court case about radio broadcasting for the proposition that differences inherent in "new media" justify divergent standards for First Amendment analysis, again suggesting that computer code was properly understood as a form of expressive media.[281]

The Second Circuit's decision to uphold the injunction, however, made clear that it conceived of the law in this case as protecting a kind of cyberproperty right of exclusion that the DMCA had brought into being.[282] In explaining the need for a prohibition against the dissemination of the code, the Second Circuit stated:

> [W]e must recognize that the essential purpose of encryption code is to prevent unauthorized access. *Owners of all property rights* are entitled to *prohibit access to their property* by unauthorized persons. Homeowners can install locks on the doors of their houses. Custodians of valuables can place them in safes. Stores can attach to products security devices that will activate alarms if the products are taken away without purchase. These and similar security devices can be circumvented. Burglars can use skeleton keys to open door locks. Thieves can obtain the combinations to safes. . . . *CSS is like a lock on a homeowner's door*, a combination of a safe, or a security device attached to a store's products.

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277. *Id.*

278. *Id.*

279. *Id.* at 449 n.25 (explaining that code is unlike other forms of technology because "it uses a notational system comprehensible by humans" and therefore "qualifies as speech").

280. *Id.* at 451. The Second Circuit was responding to the fact that First Amendment doctrine requires courts to separate what is legally expressive "speech" from that which must be defined as non-expressive "conduct." As Wagner has stated, "The crux of the speech-conduct distinction is that while 'speech' is highly protected, 'conduct' is not." R. Polk Wagner, *The Medium is the Mistake: The Law of Software for the First Amendment*, 51 STAN. L. REV. 387, 393 (1999).

281. *Corley*, 273 F.3d at 451 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969)). What is interesting here is that code is framed as a new form of "media." *Id.* Media-specific First Amendment analysis, in the abstract, would appear to be in keeping with past doctrine. *See* Wagner, *supra* note 280, at 396-98.

282. *Corley*, 273 F.3d at 452-53.

> DeCSS is computer code that can decrypt CSS. In its basic function, it is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store's products.[283]

So, according to the Second Circuit in *Corely*, the DMCA could be analogized to a statute making a disc a "home" that a CSS-like "security device" protects, or a "box" which a CSS-like "lock" holds shut.[284]

The *Corely* court actually makes real Lessig's "code is law" equation in a way Lessig has recognized and lamented. The equation is more true, post-*Corely*, than it was when it was first postulated.[285] As noted above, Lessig had stated, in reference to earlier proceedings in the case, that "[y]ou can't easily rip the contents of my DVD because the code locks it tight. The code functions as a law might function: Telling the user what she can and cannot do."[286]

Lessig's analogy of the locked box, with the CSS as lock, is entirely consistent with the court's description. But in *Corely*, applying the DMCA, the Second Circuit stated that Congress had transformed this technological power of software into a form of legal power. The encryption of the DVD *was* merely a technological lock prohibiting certain actions on the part of the user. A legal right to exclude was legislatively fashioned from a mere technological power.

As explained above, it is hard to see clearly how this type of "code to law" transformation follows from any past understanding of the proper relation of law and technology. Locks, fences, and other digital barriers may be instrumental in creating legal consequences in some cases, but generally they are simply private technologies used for private purposes, not to create new forms of exclusive property. In *Corely*, the Second Circuit read the DMCA as a law prohibiting the interference with the intended results of private software structures, effectively transforming code into law.[287] Thus, "code is law" becomes a truer statement than it once was.

Further, it is clear from *Corley* that the transformation of code to law was accompanied by a willingness to envision digital code as creating a protected

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283. *Id.* (emphasis added).

284. *See id.* This conception, although perhaps a bit perplexing, was not by any means a creation of judicial fancy. This was exactly what Congress thought it was doing in enacting the Digital Millennium Copyright Act provisions at issue in *Corely*—giving content owners the power to digitally lock and seal their digitally encoded intellectual property. *See* Madison, *supra* note 4, at 473 (noting how the U.S. Senate Report accompanying the final bill analogized the prohibited conduct to breaking and entering homes).

285. LESSIG, *supra* note 256, at xviii (stating that "code is law" is now more true than it was in the past); Gibson, *supra* note 215, at 199-202, 220 (describing the DMCA and CFAA as examples of "technolegical" statutes that intermix powers of law and software); Lessig, *Law Regulating Code*, *supra* note 216, at 7 ("The DMCA thus not only fails to balance the imbalance caused by changes in code; the DMCA plainly exacerbates it.").

286. *See* Lessig, *supra* note 211, at 990.

287. *Corley*, 273 F.3d at 458-59.

form of virtual space.[288] The court explains that the plaintiff's actions are fairly analogized to a home or store owner making technological attempts to keep burglars and intruders out of her private space.[289] The court's analogies to doors, locks, and unlawful intruders have little legal relevance unless one accepts that the owner of code (seen as someone other than the owner of the DVD) has the same legal right to prohibit "access" as is enjoyed by an owner of real property.

The court's spatial rhetorics in *Corely* serve the same rhetorical purpose they serve in the context of cyberproperty doctrine—it is through an analogy to private property rights that an injunction is issued against an activity that is legally understood as a form of speech. The justification hinges on the trope of code as property, equating the power of DeCSS to decrypt with an invasion into real property.[290]

I mention the DMCA and the *Corely* case briefly here because I think the decision illuminates two important points. First, the issues of cyberproperty, while they may have originally derived primarily from the law of trespass to chattels, are emergent in other areas of law, particularly in new statutes designed to protect new forms of digital "property" rights.[291] Second, it seems no coincidence that both the *Corely* and the *Hamidi* courts wrestled with the conflict between claims of free speech and private property.[292] Digital networks are communicative networks and computers are symbolic, information-processing machines. The agenda of cyberproperty is, in large part, to take what might be seen as a form of speech and turn it into the stuff of private property. If the law continues down this path, the conflict between claims of free speech and claims of private property rights will likely only intensify as cyberproperty impulses give rise to new statutory enactments and extensions of common law doctrines.

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288. *Id.* at 458.

289. *Id.* at 452-53.

290. *See* Madison, *supra* note 4, at 471-78 (discussing *Corely* and the DMCA). And yet if one thinks about what is really happening in the case, the spatial rhetorics employed by the court seem deeply unstable. With an encrypted DVD, there is no inner sanctum where a private owner or private property resides. Rather, the full code constituting the movie is always perfectly and fully accessible on the disc. Encryption is a type of technology that hides visible things in plain sight. For instance, take this string of letters: B A K C E R A C L. In these letters I have "locked" information through a program of encryption. However, my lock is simple to break by using the following decryption program: the reader should proceed from first letter, to the last, and work back and forth inward. Freeing the coded object of "Blackacre" from the "safe" of my encryption using my "tool" of instruction is essentially what was happening, on a technological level, with the decryption program DeCSS. Does the mere intermediation of computing technology create a "space" that did not exist in my example?

291. Gibson, *supra* note 215, at 240 (noting trends toward the expansion of such "technolegical" rights).

292. Wagner, *supra* note 2, at 513 ("Private entitlements often raise troublesome questions about their relationship to public interests in free expression; as a general matter, society deals with such questions by broadly allowing private rights holders to enforce their rights under neutral laws without raising First Amendment objections.").

CONCLUSION

There is a danger created, as Judge Easterbrook put it, when lawyers attempt to be blind trailblazers.[293] We have no reason to trust that creating broad legal rights of exclusion online will lead us to better social outcomes and good reason to believe that cyberproperty rights might well, under the cover of private property, lead to significant harms.

The majority of the California Supreme Court in *Hamidi* got the issue of cyberproperty right by simply recognizing the need for caution in the evolution of the common law.[294] As Richard Epstein once said: "In law, as in medicine, we should still remember that the basic principle is, *primum, non nocere*: first do no harm."[295]

293. Easterbrook, *supra* note 152, at 207.

294. Intel Corp. v. Hamidi, 71 P.3d 296, 312 (Cal. 2003).

295. Epstein, *Intellectual Property*, *supra* note 128, at 827.

CAN THE IRS SILENCE RELIGIOUS ORGANIZATIONS?

MEGHAN J. RYAN*

As the campaign season for the 2008 presidential election begins, politicians are already courting religious organizations, which will certainly again play a crucial role in the election's outcome.[1] During the last political campaign season, religious organizations engaged in what some would characterize as unsavory politicking.[2] For instance, a Baptist church backed a ban on gay marriage in a nationally televised Sunday service,[3] a Catholic cardinal declared that individuals wearing rainbow sashes to church to identify themselves as homosexuals would be denied communion,[4] and a bishop distributed a letter to his parishioners stating that any Catholic who votes for a political candidate supportive of abortion, same-sex marriage, or stem-cell research should be denied communion.[5] Most notably, the Archbishop of Boston threatened to deny presidential candidate John Kerry communion in the Catholic Church because of Kerry's political view on abortion.[6] Churches, however, did not act alone in exploiting issues infused with both religious and political elements. In an effort to mobilize

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1. *See, e.g.*, David Espo, *Democrats Urged to Court Churchgoers*, STAR TRIB., June 29, 2006 (noting that Senator Barack Obama stated that the Democratic party "must compete for the support of evangelicals and other churchgoing Americans"); *see also* Terry Eastland, *Houses of Worship: The Moral Majority*, WALL ST. J., Nov. 5, 2004, at W17 (stating that moral values was the determining issue in how many voters cast their ballots in the 2004 presidential election); *cf.* Laurie Goodstein, *Minister, a Bush Ally, Gives Church as Site for Alito Rally*, N.Y. TIMES, Jan. 5, 2006 (reporting that a Philadelphia minister who pledged his support for a Bush presidency in 2000 offered his church as a site for a major political rally intended to "whip up support" for Bush's Supreme Court nominee Alito).

2. The *Wall Street Journal* stated that much of this was fueled by right-wing Christians hoping to bolster presidential candidate George W. Bush, as well as other Republicans, in the 2004 election and to draw attention away from the Catholic Church's sex abuse scandals. Albert R. Hunt, *Playing Politics at the Altar*, WALL ST. J., May 27, 2004, at A21.

3. *In Brief*, WASH. POST, Sept. 25, 2004, at B09.

4. Hunt, *supra* note 2.

5. *Id.* Remarkably, this same bishop neglected to mention the death penalty or the Iraq war as worthy of excommunication. *Id.* The Catholic Church opposes both of these issues. *See* John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28; Hunt, *supra* note 2. These issues, however, were integral to the Bush campaign. Hunt, *supra* note 2.

6. *See* Gerald F. Seib, *The Catholic Vote Becomes Metaphor for Polarized Views*, WALL ST. J., Oct. 20, 2004, at A4 (noting that Kerry supports abortion rights); Editorial, *Bishops at the Ballot Box*, BOSTON GLOBE, June 16, 2004, at A20. Some evidence suggests, however, that most Catholics strongly oppose using communion as a political weapon and that this actually helped John Kerry, the Democratic candidate, in the race. Hunt, *supra* note 2.

incumbent President George W. Bush's religious supporters, the Bush campaign requested religious volunteers nationwide to turn over church directories to the campaign, distribute campaign literature, persuade their churches to hold voter registration drives, talk to seniors in the church about President Bush, recruit more volunteers for the campaign, and host campaign-related potluck dinners with church members.[7]

After various organizations protested this intermixing of religion and politics, the Internal Revenue Service ("IRS") responded.[8] It sent a letter to both the Republican and Democratic national committees, warning that the tax-exempt status of a religious organization could be revoked if the organization engaged either directly or indirectly in political activities.[9] Indeed, the IRS has revoked the tax-exempt statuses of religious organizations in the past for impermissibly intervening in political campaigns.[10] Further, beginning around the time of the 2004 presidential election, the IRS increased its monitoring of potentially improper political activities by tax-exempt religious organizations.[11] As of December 2005, the IRS was working to clear approximately 130 cases from the 2004 presidential election involving possible violations of § 501(c)(3) by tax-exempt organizations, including approximately fifty churches.[12] It is difficult to determine exactly how many of these religious organizations will lose their tax-exempt statuses because the IRS is legally prohibited from disclosing the details and the names of the organizations it investigates.[13] However, the IRS has revealed that at least one-third of its investigations for impermissible intervention in political campaigns involve religious organizations.[14] With this increased IRS attention, religious organizations must now be mindful that their messages do not contain impermissible political content, lest they risk losing their tax-exempt

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7. *National Briefing Pulpit Politics: Bush Politicking Between the Pews Once Again*, AM. POL. NETWORK, July 1, 2004, at 20. The "instruction sheet" that the Bush campaign circulated listed twenty-two "duties" for the religious volunteers to perform by specific dates. *Id.*

8. *See id.*

9. *Id.*

10. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) (approving the IRS's revocation of a church's § 501(c)(3) tax-exempt status because the church impermissibly intervened in a political campaign). Further, three tax-exempt organizations are expected to lose their tax-exempt statuses as a result of their politicking during the 2004 campaign season. *See IRS Finds Prohibited Political Activity in Majority of Exempt Group Exams*, 74 U.S.L.W. 2524, 2524 (Mar. 7, 2006) [hereinafter *IRS Finds Prohibited Political Activity*].

11. Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, Oct. 29, 2004, at A08.

12. *IRS to Finish 2004 Election Cases on Political Intervention Amid Debate*, 74 U.S.L.W. 2335, 2335 (Dec. 6, 2005). Recently, the IRS warned a California church that it could lose its tax-exempt status because a guest preacher gave an anti-war sermon on the eve of the 2004 presidential election. *Church: Anti-war Sermon Imperils Tax Status*, CNN.COM, Nov. 7, 2005, http://www.phillyblog.com/philly/showthread.php?t=12329.

13. Genaro C. Armas, *60 Tax-Exempt Groups Under Investigation; at Issue Are IRS Regulations That Bar Political Activities*, WASH. POST, Oct. 30, 2004, at A04.

14. *See id.*

statuses.[15]

Various scholars speculate as to whether the religious organizations under investigation indeed violated the IRS limitations on politicking,[16] and if they did, whether such standards are constitutionally permissible.[17] In this debate, proponents of the IRS regulations argue that in light of the test generally applied in free exercise cases, the IRS regulations cannot be invalidated on that ground.[18] Opponents of the IRS regulations highlight religious organizations' interests in stating their religious beliefs, which may coalesce with what the IRS would consider political.[19] Scholars, however, have overlooked the possibility of attacking the IRS regulations on the ground of a *Smith* hybrid claim,[20] which ratchets up the level of scrutiny when both free exercise and free speech concerns are implicated.[21]

This Article argues that the IRS regulations applying the § 501(c)(3)

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15. *See id.*

16. *See, e.g.*, Allan Samansky & Donald Tobin, *Point-Counterpoint on Election Activities of Churches and Charities*, ELECTION LAW @ MORITZ, Aug. 24, 2004, http://moritzlaw.osu.edu/electionlaw/comments/2004/040824.php (debating whether § 501(c)(3) dictates that churches should lose their tax-exempt statuses when they deny members communion because of the way they vote or when they clearly support one political candidate over another).

17. *See, e.g.*, Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 493 n.343 (1991) (noting that the constitutionality of § 501(c)(3)'s limitations on political participation could be questioned); Samansky & Tobin, *supra* note 16 (debating the constitutionality of any limitation that would prevent § 501(c)(3) religious organizations from incidentally espousing political messages).

18. *See, e.g.*, John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 567, 586 (1992). Similarly, IRS Commissioner Mark Everson has stated that "[f]reedom of speech and religious liberty are essential elements of our democracy, . . . But the [U.S.] Supreme Court has in essence held that tax exemption is a privilege, not a right, stating that 'Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment Activities.'" *IRS Finds Prohibited Political Activity*, *supra* note 10 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)) (alterations in original).

19. *See, e.g.*, Samansky & Tobin, *supra* note 16 (arguing that leaders of religious organizations should be free to point out the moral components of public issues without risking their § 501(c)(3) tax-exempt statuses); Deborah Zimmerman, Note, Branch Ministries, Inc. v. Rossotti: *First Amendment Considerations to Loss of Tax Exemption*, 30 N. KY. L. REV. 249, 265 (2003) (outlining church's free speech and free exercise interests).

20. A *Smith* hybrid claim involves both a free exercise claim and a free speech claim. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990) (outlining the *Smith* hybrid claim), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 109-280, 107 Stat. 1488, *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006) .

21. *See generally id.* (explaining that a heightened level of scrutiny applies when both free exercise and free speech claims are involved); *infra* Part III.B.

limitation on intervening in political campaigns must be more deferential when applied to religious organizations so as not to be vulnerable to invalidation under a *Smith* hybrid claim. Part I outlines the § 501(c)(3) limitation on intervention in a political campaign, as well as the IRS regulations used to determine whether organizations are engaged in prohibited intervention in political campaigns. It notes that religious organizations are treated no differently than other organizations under these regulations. Part II explains that, in some circumstances, withholding a tax benefit from an organization simply because the organization exercises its constitutional rights may be an unconstitutional burden on that organization. Part III summarizes the constitutional test applied to free exercise claims and explains how a stricter level of scrutiny applies when free speech claims are also at issue. It argues that due to the unclear line between religious and political issues, the IRS regulation compels religious organizations to remain silent on issues that are both religious and political. This chills religious organizations' freedom of political and religious speech and burdens their free exercise of religion. The combination of these burdens makes the IRS's application of § 501(c)(3) unconstitutional under a *Smith* hybrid claim. Part IV suggests that to avoid this constitutional difficulty, the IRS should defer to religious organizations' bona fide claims that messages are religious when the messages play such dual roles. Additionally, the IRS should clarify how it will apply § 501(c)(3) so religious organizations' actions are not chilled by uncertain fears of losing their tax-exempt statuses.[22]

I. SECTION 501(C)(3) AND THE IRS'S CORRESPONDING REGULATIONS LIMIT POLITICAL ACTIVITY BY § 501(C)(3) ORGANIZATIONS

Internal Revenue Code § 501(c)(3) and corresponding IRS regulations prevent tax-exempt organizations from engaging in political activities.[23] The tax-exempt status of § 501(c)(3) is reserved for organizations "which do[] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[24] This prohibition against political campaign intervention is absolute; there are no *de minimus* exceptions to the rule.[25]

Organizations that do not adhere to the limitations on engaging in political

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22. Although this Article focuses on the vulnerability of the IRS's application of § 501(c)(3) under the constitutional framework set forth in *Smith*, perhaps an even stronger argument for deference can be made under the Religious Freedom Restoration Act of 1993. *See supra* note 20.

23. *See* I.R.C. § 501(c)(3) (2000).

24. *Id.* The statute also provides that § 501(c)(3) organizations may not have any part of their net earnings "inure[] to the benefit of any private shareholder or individual," or devote a substantial part of their resources to attempting to influence legislation. *Id.*

25. United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1989). *But see* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 584 (8th ed. 2003) (comparing § 501(c)(3) to § 610 of the Federal Corrupt Practices Act, which is absolute on its face but has been found to allow *de minimus* exceptions).

activity are referred to as "action" organizations and are not entitled to the tax exemption conferred by § 501(c)(3).[26] If found in violation of the § 501(c)(3) limitation on intervening in a political campaign, the IRS will revoke the organization's § 501(c)(3) status indefinitely.[27] The action organization will lose its tax-exempt status for that year and will have to re-apply for its tax-exempt status if it hopes to have it reinstated the following year.[28] Additionally, in instances where action organizations egregiously violate the rules applying to tax-exempt organizations, the IRS may revoke their tax-exempt statuses retroactively.[29] This means that the organizations may be taxed for the year in which their tax-exempt statuses are revoked, as well as for previous years.[30] Further, the IRS may also apply penalty taxes to the organizations, requiring them to pay sums of up to $15,000, depending on the nature of the violation.[31]

The lack of meaningful legislative history as to what constitutes impermissible intervention in a political campaign makes the § 501(c)(3) limitation difficult to apply.[32] This limitation, which was added to § 501(c)(3) without the benefit of congressional hearings,[33] was introduced as a floor

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26. *See* I.R.C. § 501 (2000); Treas. Reg. § 1.501(c)(3)-1(c)(3) (2000). Although "action" organizations are not entitled to § 501(c)(3) statuses, they may still be entitled to § 501(c)(4) statuses. *See generally* I.R.C. § 501(c)(4) (2000) (providing that organizations not organized for profit but operated exclusively for the promotion of social welfare and devoting their earnings exclusively to charitable, educational, or recreational purposes, are entitled to tax-exempt statuses). Unlike § 501(c)(3) organizations, § 501(c)(4) organizations may attempt to influence political campaigns or engage in more targeted issue advocacy without risking their tax-exempt statuses. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS 335-38 (2003). While taxpayers who contribute to a § 501(c)(3) organization may deduct the amount of their contributions on their federal income tax returns, contributions to § 501(c)(4) organizations may not be deducted. *See* I.R.C. § 170(c)(2) (2000).

27. *See generally* HOPKINS, *supra* note 25, at 654-63, 684-99 (explaining the consequences of engaging in behavior prohibited by the guidelines for tax-exempt statuses).

28. *See id.*

29. *See generally id.* at 659-63 (explaining the consequences of retroactive revocation of an organization's tax-exempt status).

30. *See id.*

31. *See id.* at 600-02.

32. *See* Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 516 (1999) ("The absence of any meaningful legislative history for the political activities provisions of § 501(c)(3) further complicates matters."); *see also* ROBERT L. HOLBERT, TAX LAW AND POLITICAL ACCESS 27 (1975) (noting that the legislative history pertaining to the enactment of § 501(c)(3) is "skimpy"). While there is no clear legislative history regarding the enactment of this limitation on political activity, it may be linked to the fundamental principle of the separation of church and state. *See* Benjamin S. De Leon, Note, *Rendering a Taxing New Tide on I.R.C. § 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691, 695 (2004).

33. *See* Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code*

amendment and adopted in the Senate.[34] Senator Lyndon B. Johnson of Texas offered the amendment out of concern that funds provided by a certain charitable foundation had been used to help finance the campaign of his opponent in a senatorial primary election.[35] Perhaps the only useful legislative history lending insight into the purpose of the provision is a House Report that expresses a congressional policy that the U.S. treasury should be neutral in political affairs and thus should not subsidize political activity.[36] While the original form of the bill prohibited only "partisan politics," this phrase was deleted prior to the law's enactment.[37] Still, this notion of partisanship is reflected in the courts' and IRS's interpretations of the limitation.[38]

In the context of religious organizations, courts have readily approved the IRS's revocation of tax exempt statuses when flagrant political activity has been at issue.[39] Courts have not, however, had the opportunity to rule in situations involving less egregious activity by religious organizations.[40] Therefore, courts have not had to delineate the scope of the § 501(c)(3) limitation as applied to religious organizations. The primary case in which a court confronted the question of whether a religious organization impermissibly intervened in a political campaign is *Branch Ministries, Inc. v. Rossotti*.[41] There, the D.C. Circuit approved the IRS's revocation of a church's § 501(c)(3) tax-exempt status because the organization placed full-page advertisements in two newspapers that urged Christians not to vote for presidential candidate Bill Clinton because of his positions on certain moral issues.[42] The court did not expound on whether less egregious activities by religious organizations would contravene the limitations set forth in § 501(c)(3).[43] Similarly, in *Christian Echoes National Ministry, Inc.*

Prohibits; Why; To What End?, 42 B.C. L. REV. 903, 905 (2001).

34. *See* Colleen T. Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 GEO. WASH. L. REV. 1580, 1635 (1992).

35. *See id.* at 1635-36.

36. H.R. REP. NO. 100-391, pt. 2, at 1624-25 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313-1205 (noting that the IRS should strengthen its enforcement efforts in policing the § 501(c)(3) limitations).

37. *See* H.R. REP. NO. 73-1385, 3-4, 17, 19 (1934); S. REP. NO. 73-558, 26 (1934); 78 CONG. REC. 7831 (1934); 78 CONG. REC. 5959 (1934).

38. *See infra* notes 53-56.

39. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) (ruling on whether a church impermissibly intervened in a political campaign).

40. Given that most appeals regarding the revocation of an organization's tax-exempt status result in settlements, courts rarely rule on whether an organization has engaged in proscribed political campaigning. For a discussion of IRS settlements and the settlement process, see Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 341 (1999) (explaining that "many tax cases never make it to court because they are resolved by the IRS Appeals Office before they are ever docketed").

41. *See Branch Ministries*, 211 F.3d at 139-42.

42. *Id.* at 140-42.

43. *See id.* (analyzing whether the IRS has the authority to revoke the tax-exempt status of

v. United States, the Tenth Circuit approved the IRS's revocation of a church's § 501(c)(3) tax-exempt status, but did not clarify the scope of the prohibition on intervening in a political campaign.[44] In that case, a religious organization attacked President Kennedy for being too liberal and urged its members to elect conservatives such as Senator Strom Thurmond.[45] As in *Branch Ministries*, the court did not explore the limits of § 501(c)(3)'s prohibition on intervening in a campaign outside of the egregious activities at issue.[46] Therefore, these cases give little guidance to religious organizations as to whether § 501(c)(3) permits them to convey messages to their members that have both religious and political components.

The IRS has attempted to clarify the prohibition on intervening in a political campaign by issuing regulations and technical advice memoranda on the issue.[47] In Treasury Regulation 1.501(c)(3)-1(c)(3)(iii), the IRS states that prohibited activities "include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate."[48] However, the IRS has not limited violations of § 501(c)(3) to instances in which organizations explicitly advocate the election or defeat of a clearly-identified candidate.[49] The IRS fears that this would allow an organization to surreptitiously intervene in a political campaign by using "code" language to support a candidate,[50] thus allowing too much election-influencing activity among § 501(c)(3) organizations.[51] Instead, the IRS has determined that even issue advocacy may rise to the level of prohibited intervention if it is employed in the midst of a hotly contested political campaign so as to impliedly endorse or oppose a candidate.[52]

In determining whether an activity is prohibited under § 501(c)(3), the IRS generally draws a line between activities that are conducted in a nonpartisan manner and those that are not.[53] Prohibited activities under § 501(c)(3) include

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a bona fide church, whether the revocation violated the First Amendment, and whether selective prosecution on the part of the IRS violated the Equal Protection Clause).

44. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855-56 (10th Cir. 1972).

45. *Id.* at 856.

46. *See id.*

47. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

48. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

49. *See* FISHMAN & SCHWARZ, *supra* note 26, at 333; Judith E. Kindell & John F. Reilly, *Election Year Issues*, FY 1993 IRS EXEMPT ORG. CONTINUING PROF'L EDUC. TECHNICAL INSTRUCTION PROGRAM 400, 410-11 (1992), *available at* http://www.irs.gov/pub/irs-tege/eotopicn93.pdf.

50. Kindell & Reilly, *supra* note 49, at 411.

51. *See* Editorial, *Free Speech vs. Tax Code*, WALL ST. J., Dec. 14, 2004, at A14.

52. *See* FISHMAN & SCHWARZ, *supra* note 26, at 333.

53. *See, e.g.*, HOPKINS, *supra* note 25, at 591 ("A traditional distinction between political campaign activity and voter education activity has been that the latter is nonpartisan.").

political action committees and financial support of a candidate.[54] Activities that may be permissible if conducted in a nonpartisan manner include educational activities, voter guides, candidate questionnaires, public forums, voter drives, and inviting candidates to speak at an organization's event.[55] If conducted in a partisan manner, however, engaging in any of these activities is grounds for revoking an organization's tax-exempt status.[56] In Technical Advice Memorandum 91-17-001, for example, the IRS determined that an educational organization impermissibly intervened in a political campaign when it urged its members to vote for "the progress of the last 3-1/2 years."[57] The IRS concluded that the organization's audience would have known that the organization supported President Ronald Reagan's reelection, making the phrase tantamount to specifically urging the audience to vote for President Reagan.[58] Similarly, the IRS's application of § 501(c)(3) indicates that if a religious organization argues that abortion is immoral, this may constitute untoward politicking if a particular candidate in a controversial election has identified this issue as central to his campaign platform.[59] In such a case, preaching on the issue may be considered tantamount to supporting a particular candidate in the race.[60]

Despite the IRS's attempt to clarify the scope of the § 501(c)(3) limitation on intervening in a political campaign, organizations remain unclear as to which activities may constitute impermissible intervention in a political campaign.[61] This is especially true with respect to religious organizations.[62] This may be due, in part, to differing messages from Congress and the IRS as to the scope of the § 501(c)(3) limitation as applied to religious organizations. In the hearings on the Omnibus Budget Reconciliation Act, Congress expressed uncertainty as to whether a single standard to measure the political activities of all § 501(c)(3) organizations was appropriate.[63]

The notion that § 501(c)(3) religious organizations should be treated uniquely can be found throughout the Tax Code. For example, unlike other organizations, religious organizations are presumed to be exempt and need not

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54. *See generally* Steven B. Imhoof, Note, *The Politics of Politicking Under IRC § 501(c)(3): A Guide for Politically Active Churches*, NEXUS 97, 100-01 (Fall 2000) (articulating guidelines for religious organizations to follow in avoiding revocation of their tax-exempt statuses).

55. *See id.* at 101-05.

56. *Id.*

57. I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991).

58. *See id.*

59. *See* Kindell & Reilly, *supra* note 49, at 410-11.

60. *See generally id.* (outlining the parameters of permissible issue advocacy).

61. *See* Brian Faler, *Falwell on 'Thugs' and Taxes*, WASH. POST, Aug. 6, 2004, at A06.

62. *See id.* (reporting that Jerry Falwell was to hold a conference to educate church leaders as to what they may say during religious services without losing their tax-exempt statuses).

63. H.R. REP. NO. 100-391, pt. 2, at 1624-25 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313-1205 (questioning whether it is appropriate or feasible for the IRS to utilize a single standard in determining § 501(c)(3) violations).

file applications for determination of this status.[64] Additionally, religious organizations need not file annual financial information returns,[65] and they have various immunities and protections from IRS audits.[66] Yet, the IRS appears to treat religious and nonreligious organizations alike when interpreting and applying the § 501(c)(3) limitation on intervention in political campaigns.[67] It makes no distinction between organizations accorded an additional layer of protection under the Free Exercise Clause and those accorded no additional protection.[68]

II. WITHHOLDING A TAX BENEFIT CAN BE A BURDEN ON CONSTITUTIONAL RIGHTS

In some circumstances, denying a tax exemption to a claimant for exercising its constitutional rights—for example speech or religious rights—is unconstitutional.[69] This withholding of a tax benefit from an organization is known as an unconstitutional condition.[70] In *Speiser v. Randall*, for example, the Supreme Court held that "[t]o deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[71] The Court thus invalidated a California requirement that property tax exemptions for veterans would be available only to those who would declare that they did not advocate the forcible overthrow of the government.[72]

In other circumstances, however, the Court has held that denying an organization a tax benefit is a mere nonsubsidy and thus does not violate the Constitution.[73] For example, in *Regan v. Taxation With Representation*, the Court upheld § 501(c)(3) limitations as applied to a nonreligious organization

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64. I.R.C. § 508(c) (2002) (amended Aug. 17, 2006).

65. *Id.* § 6033(a)(2)(A)&(C); IRS, *Tax-Exempt Status for Your Organizations*, Publication 557, 8 (Mar. 2005).

66. *See generally* I.R.C. § 7611 (2002) (listing restrictions on the IRS in initiating tax inquiries of churches).

67. *See generally* Treas. Reg. § 1.501(c)(3)-1(c)(3) (as amended in 1990) (declining to distinguish between religious organizations and other § 501(c)(3) organizations).

68. *Cf. id.*

69. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 518, 528-29 (1958) (holding that a law conditioning veterans' tax benefits on veterans swearing not to advocate the forcible overthrow of the government is unconstitutional).

70. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 333-34 (2d ed. 2003).

71. *Speiser*, 357 U.S. at 518.

72. *Id.* at 528-29.

73. *See, e.g.*, Regan v. Taxation With Representation, 461 U.S. 540, 541-51 (1983) (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe on that organization's free speech rights).

engaged in lobbying for tax reform.[74] The Court held that Congress is not required to provide tax-exempt organizations public money with which to lobby.[75] It reasoned that Congress's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."[76] The Court noted that the organization in question had the option of segregating its tax-exempt activities from its political activities by creating a separate § 501(c)(4) organization to engage in its political activities.[77] The organization was not penalized for engaging in political speech because it could still do so under its sister § 501(c)(4) entity; the government just refused to subsidize that speech.[78] In *Federal Communications Commission v. League of Women Voters of California*, however, the Court held that a noncommercial educational broadcasting station could not pragmatically segregate its political and tax-exempt activities into distinct § 501(c)(3) and § 501(c)(4) organizations; therefore, a law conditioning federal funding on the station's forbearance of its right to editorialize was determined to be an unconstitutional penalty.[79]

While the Court's jurisprudence in this complex area of unconstitutional conditions remains murky, it is clear that withholding a tax benefit from an organization can be an unconstitutional penalty in some cases.[80] While scholars continue to debate which factors cause a condition to be a penalty instead of a nonsubsidy,[81] it seems that a law is considerably more likely to be labeled as an unconstitutional penalty when it is difficult for an organization to segregate its tax-exempt actions from its political actions under the law.[82]

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74. *Id.* at 545-46 (holding that § 501(c)(3) limits do not impose an "unconstitutional condition" on free speech).

75. *Id.*

76. *Id.* at 549 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

77. *Id.* at 544.

78. *Id.* at 546. The distinction between the government penalizing speech and not subsidizing speech is vital in free speech challenges. The former almost certainly renders a statute unconstitutional, whereas the latter almost always ensures that the statute will be upheld. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 202-03 (1991) (upholding speech-restrictive, abortion-related conditions on family planning subsidies); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (finding unconstitutional a California statute that provided for property tax exemptions only for veterans who would declare they did not advocate the forcible overthrow of the government).

79. FCC v. League of Woman Voters, 468 U.S. 364, 399-400 (1984).

80. *See, e.g., id. But see IRS Finds Prohibited Political Activity, supra* note 10 (noting the IRS Commissioner's reference to the Supreme Court's holding that a tax exemption is a privilege and that Congress does not violate an organization's First Amendment rights by refusing to subsidize its First Amendment activities).

81. *See, e.g.*, Lisa Babish Forbes, Note, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections*, 42 CASE W. RES. L. REV. 509, 543 n.185 (1992) (explaining that "commentators are by no means of one mind as to the essential characteristics of such [an] analysis").

82. *See League of Women Voters*, 468 U.S. at 400; *Speiser*, 357 U.S. at 518; *see also* Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 126 S. Ct. 1297, 1307 (2006) (suggesting

III. THE IRS'S APPLICATION OF § 501(C)(3) TO RELIGIOUS ORGANIZATIONS PRESENTS UNIQUE CONSTITUTIONAL CONCERNS

Limiting an organization's political activities presents distinct First Amendment concerns when applied to religious organizations because the Free Exercise Clause imposes additional constitutional protections when religious organizations are involved.[83] Religious and political issues are so intertwined in some instances that it is difficult to separate religious messages from political ones.[84] This blending of political and religious speech and actions exacerbates the free speech and free exercise concerns implicated when applying § 501(c)(3) and the IRS's corresponding regulations to religious organizations.[85] Even if each of these burdens, alone, is not enough to rise to a constitutional level, the compounding of free speech and free exercise concerns makes the IRS regulation applying § 501(c)(3) ripe for challenge under a *Smith* hybrid claim.[86]

A. The Line Between Religious and Political Issues Is Difficult to Draw

Application of § 501(c)(3) requires the IRS to distinguish between political and other activities.[87] This distinction must be made even when the two activities are closely intertwined.[88] In the educational context, for example, the IRS must determine whether the slogan "vote for the progress of the last 3-1/2 years" is an educational or a political message.[89] While the distinction may be relatively clear in this example, categorization can be exceedingly difficult in the context of messages that are arguably both religious and political.

The blending of religion and politics makes distinguishing political activity from religious activity extremely difficult. "Religion and politics have been intertwined since the birth of our nation."[90] The motto "In God We Trust" on our

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that the distinction between an unconstitutional condition and a constitutional nonsubsidy is whether the condition could have been constitutionally imposed directly).

83. The Free Exercise Clause states that "Congress shall make no law respecting . . . the free exercise [of religion]." U.S. CONST. amend. I.

84. *See infra* Part III.A.

85. *See infra* Part III.B. *But see* Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983) (holding that § 501(c)(3) as applied to a tax-exempt organization is not an unconstitutional condition on free speech). The freedom of speech difficulties that § 501(c)(3) poses apply to all § 501(c)(3) organizations. *See infra* Part III.B.1. These concerns are heightened in the context of religious organizations because freedom of religion issues are also present. *See infra* Part II.B.2.

86. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990) (outlining the hybrid claim); *infra* Part III.B.

87. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

88. *See id.*

89. I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991); *see supra* text accompanying notes 57-58.

90. Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise*

currency and the phrase "Under God" in the Pledge of Allegiance evidence this presence of religious elements in political life.[91] During 2004, this political intertwinement took center stage with, for example, churches denying communion to members for voting for a particular political candidate or announcing that they would do so.[92] The denial of communion to church members is an exclusively religious act.[93] Urging members to vote for a particular candidate, however, may constitute intervention in a political campaign.[94] When these political and religious acts are intertwined it is arguable whether they can be separated into distinct religious and political components.

Religion and politics have become increasingly intertwined.[95] Issues that originally fell solely within the realm of religion have been co-opted by the political sphere. Politicians pluck contentious moral issues from within what used to be exclusively the religious domain and use them as a foundation on which to base their platforms. The issue of abortion, for example, has long been condemned by both the Jewish and Christian faiths but has only more recently become an issue of national politics.[96] These "moral issues" are then used in an attempt to court religious constituents.[97] Indeed, exit polls from the 2004

Section 501(c)(3) of the Internal Revenue Code, 49 FORDHAM L. REV. 536, 536 (1981) (citing B. DULCE & E. RICHTER, RELIGION AND THE PRESIDENCY 1-11 (1962)).

91. *See id.*

92. *See, e.g.*, Hunt, *supra* note 2 (noting that a Catholic cardinal declared that anyone wearing a rainbow sash to church to identify himself as a homosexual would be denied communion).

93. *See* John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 572 (1992).

94. *See generally supra* Part I.

95. *See* TIMOTHY L. FORT, LAW AND RELIGION 33 (1987) (explaining that religion and law are "inseparably linked" since both are sets of ethics, attempting to govern human behavior); *see also* Andrea Pallios, Note, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HASTINGS CONST. L.Q. 131, 131 (2002).

96. *See infra* note 97. Politicians attempt to profit from preaching on these issues themselves because issues of morality can be especially moving. *See* KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 37 (3d ed. 1997) (noting that the potent nature of moral issues has the ability to mobilize citizens more than economic issues).

97. Religious organizations have historically espoused passionate views on issues such as abortion and homosexuality. For example, the Jewish faith has emphatically condemned abortion for over 2000 years, and the Christian faith has opposed abortion for at least 1800 years. *See* MICHAEL J. GORMAN, ABORTION & THE EARLY CHURCH 33, 47-48 (Intervarsity Press 1982). In contrast, abortion has only more recently become a topic worthy of political debate. *See* Richard K. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299, 305 n.18 (1990) (citing Webster v. Reprod. Health Servs., 492 U.S. 490, 531 (1989)) (suggesting that abortion has only become a political issue since the Supreme Court handed down the *Roe v. Wade* decision in 1973); *Annotated Legal Biography on Gender*, 10 CARDOZO WOMEN'S L.J. 723, 779 (2004) ("The issue of abortion concerns the needs and demands of the nineteenth and twentieth centuries." (quoting Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101, 102 (2003))). Thus, it is only recently that religious groups and politicians have faced off on such

presidential election indicate that "moral values" was the issue most prevalent on many voters' minds when they cast their ballots.[98]

As a result of the political co-option of religious issues, the body of issues that may be considered exclusively religious is steadily decreasing.[99] Under the IRS's current interpretation of § 501(c)(3), religious organizations cannot safely speak on issues that may contain both religious and political overtones.[100] As such, the body of issues on which religious organizations may safely speak is similarly decreasing.[101] Indeed, organizations that made remarks that lie in the gray area between religious and political speech during the 2004 presidential campaign season are currently under investigation or have already received warnings from the IRS and are at serious risk of losing their § 501(c)(3) statuses.[102] Further, the IRS appears to be growing bolder in challenging religious organizations on their use of arguably political speech.[103] Even if the IRS was not actively investigating these religious organizations, the organizations' fears of losing their tax-exempt statuses is often effective in deterring many of them from promulgating messages that may have both political and religious components.[104] Research demonstrates that many § 501(c)(3) organizations cower in fear of the IRS and avoid any kind of advocacy, even that which might be permitted.[105]

The uncertain line between permitted religious and proscribed political activities is exacerbated by the ever-growing campaign season. Section 501(c)(3) prohibits tax-exempt organizations from engaging in activities that could be interpreted as supporting or opposing a candidate for public office during the campaign season.[106] But in modern times the campaign season is an ongoing

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contentious issues.

98. Eastland, *supra* note 1.

99. *Cf.* Pallios, *supra* note 95, at 131 (noting that religion and politics are becoming increasingly more intertwined).

100. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

101. Even if religious organizations are at fault for the declining body of issues that are exclusively religious, the fact remains that the number of exclusively religious issues on which religious organizations may safely speak is decreasing.

102. *See Taxation-Exempt Organizations: IRS to Finish 2004 Election Cases on Political Intervention Amid Debate*, 74 U.S.L.W. 2335 (Dec. 6, 2005) [hereinafter *IRS to Finish 2004 Election Cases*]; *Taxation-Exempt Organizations: IRS Memo Sets Procedures to Examine Possible Political Activity by Charities*, 74 U.S.L.W. 2336 (Dec. 6, 2005).

103. *See* Allen, *supra* note 11; *see also IRS to Finish 2004 Election Cases*, *supra* note 102 (noting that "[i]n 2004, the IRS created a political intervention project designed to look at all Section 501(c)(3) groups and their involvement in political campaigns").

104. *See* Armas, *supra* note 13.

105. *See* Jeffrey M. Berry, *Who Will Get Caught in the IRS's Sights?*, WASH. POST, Nov. 21, 2004, at B03.

106. I.R.C. § 501(c)(3) (2000).

phenomenon.[107] "Candidates for the presidency and Congress now are in a perpetual campaign mode."[108] When presidents are not overtly campaigning for reelection, they consider the electoral impact of nearly every policy decision.[109] Because § 501(c)(3) organizations are prohibited from even insinuating that one candidate is preferred over another—for instance, based on a candidate's stance on a specific issue—the expanding campaign season further circumscribes a religious organization's ability to speak within the confines of the IRS regulations applying the § 501(c)(3) limitation on intervening in a political campaign.[110]

B. The Smith *Hybrid Claim Triggers Strict Scrutiny When Both Free Exercise and Free Speech Claims Are Involved*

The intertwinement of religion and politics makes for a unique challenge to the IRS's regulations implementing § 501(c)(3) under the Free Exercise Clause. Generally, claiming that a law is unconstitutional on the ground of the Free Exercise Clause has become difficult since the Supreme Court's decision in *Employment Division v. Smith.*[111] There, the Court held that most free exercise challenges are subject only to a deferential rational basis standard of review.[112] The Court carved out an exception, however, when the case involves a colorable free exercise claim in addition to the claim of another fundamental right, such as a free speech claim.[113] Although the *Smith* Court upheld the statute in question as constitutional under the First Amendment, it distinguished cases such as *Cantwell v. Connecticut*[114] and *Murdock v. Pennsylvania*[115] by noting that the facts at issue in *Smith* only involved a free exercise claim.[116] The Court stated that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated

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107. *See generally* THE PERMANENT CAMPAIGN AND ITS FUTURE (Norman J. Ornstein & Thomas E. Mann eds., 2000) (explaining the causes and consequences of what has become the "permanent campaign").

108. *Id.* at vii.

109. Kathryn Dunn Tenpas, *The American Presidency: Surviving and Thriving Amidst the Permanent Campaign*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 108, 115 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

110. *See* Kindell & Reilly, *supra* note 49, at 446-49; *supra* notes 50-59.

111. 494 U.S. 872, 881-82 (1990) (holding that neutral, generally applicable laws are usually scrutinized under the Free Exercise Clause with a mere rational basis standard).

112. *See id.*

113. *See id.* at 881.

114. 310 U.S. 296, 308 (1940) (holding unconstitutional the conviction of Jehovah's Witnesses who were arrested for violating a law that prohibited solicitation).

115. 319 U.S. 105, 115 (1943) (holding unconstitutional, as applied, a law requiring Jehovah's Witnesses to obtain a license before soliciting).

116. *Smith*, 494 U.S. at 881.

> action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .[117]

The Court referred to such a claim as a "hybrid."[118] In such cases, strict scrutiny is the appropriate standard to apply,[119] requiring that the statute or regulation at issue be necessary to achieve a compelling governmental interest.[120]

Although the *Smith* Court sought to hand down a bright-line rule,[121] it neglected to explain in detail exactly what constitutes a hybrid claim. Because the Court was somewhat vague in *Smith*, lower courts are divided as to how they should apply the hybrid claim analysis.[122] Since the *Smith* decision, the Supreme Court has not heard a case in which both a free exercise claim and another First Amendment claim were at issue. Thus, the Court has not had the opportunity to clarify the parameters of the hybrid claim.

The majority of circuit courts applying the hybrid claim analysis explain that each First Amendment claim need only be colorable, and not necessarily successful in its own right, to prevail under *Smith*.[123] If the free speech aspect of the claim is, itself, a sufficient reason to strike down the law in question, then

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117. *Id.*

118. *Id.* at 882.

119. *See id.* at 886 n.3 (rejecting the notion that neutral laws of general applicability, which do not also regulate speech, are subject to a compelling interest analysis); *see also* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 608-09 (2002) (noting that hybrid claims are subject to strict scrutiny analysis).

120. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529 (Richard A. Epstein et al. eds., 2001); Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1314 (2004).

121. *See* Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 380 (2004).

122. Courts have differed in how they apply *Smith*'s construct of hybrid claims. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL'Y 119, 187-90 (2002). Some lower courts attempt to interpret the Court's directive in *Smith* and give meaning to the notion of a hybrid claim. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998) (holding that the hybrid claim analysis applies when plaintiffs have a "colorable" claim on the basis of another First Amendment right in addition to a claim under the Free Exercise Clause). Other courts, however, have rejected the notion of hybrid claims. *See, e.g.*, Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (explaining that the notion of a hybrid claim in *Smith* was mere dicta); Kissinger v. Bd. of Tr. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny to a hybrid claim). Still other courts avoid the issue altogether. *See* Brownstein, *supra*, at 189. Some courts have held that the hybrid analysis only applies when plaintiffs can demonstrate that the claim accompanying the free exercise claim is independently viable. *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (holding that the hybrid analysis was not applicable since plaintiffs failed to state an independently viable substantive due process claim).

123. *See, e.g.*, *Swanson*, 135 F.3d at 699-700.

analyzing the claim under the Free Exercise Clause would be superfluous.[124] Similarly, if the free exercise claim, alone, invalidates the law, there is no need for the free speech component of the hybrid claim.[125] Therefore, the *Smith* Court contemplated a claim that is independently plausible as both a free exercise claim and a free speech claim, yet where neither the free exercise nor the free speech claim would independently give rise to a constitutional violation.[126] Certainly, neither the free exercise nor the free speech claim can be frivolous.[127] Both claims may, however, fall short of independently invalidating the law or regulation at issue.[128] As Professor Brownstein explains, this hybrid claim is best understood as ratcheting up the standard of scrutiny when each claim individually is subject to a standard less than strict scrutiny.[129]

Taking the hybrid claim into account,[130] the IRS regulation applying the § 501(c)(3) limitation on intervening in a political campaign is a prime target for invalidation. A challenge to the IRS's application of § 501(c)(3) would be similar to the free exercise challenges in *Cantwell*[131] and *Murdock*,[132] which the Court referred to in its *Smith* decision.[133] In *Cantwell*, the Court overturned the conviction of three Jehovah's Witnesses who were arrested for violating a Connecticut law that prohibited solicitation.[134] The Court found that the law deprived the defendants of their free exercise rights under the First and Fourteenth Amendments and burdened their rights to free speech as well.[135] Similarly, in *Murdock*, the Court invalidated a Pennsylvania law as applied to Jehovah's Witnesses.[136] The statute required persons canvassing and soliciting

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124. *Id.*

125. *See id.*

126. *Id.* at 699.

127. If it were possible to make a legitimate hybrid claim when either the free exercise claim or the free speech claim were frivolous, then the traditional scrutiny afforded such claims when asserted independently would be undermined.

128. *See Swanson*, 135 F.3d at 700.

129. *See* Brownstein, *supra* note 122, at 191 (arguing that the problem with the concept of hybrid rights is not incoherence).

130. *Compare* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (noting that analysis under *Smith*'s hybrid claim is appropriate when there is a fair probability or likelihood that each claim would be successful on its merits), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (arguing that the hybrid claim of *Smith* is untenable); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122-24 (1990) (arguing that the hybrid claim of *Smith* was not intended to be taken seriously).

131. 310 U.S. 296 (1940).

132. 319 U.S. 105 (1943).

133. Employment Div. v. Smith, 494 U.S. 872, 881 (1990); *see supra* text accompanying notes 114-15.

134. *Cantwell*, 310 U.S. at 300-02, 308.

135. *Id.* at 303-04.

136. *Murdock*, 319 U.S. at 115.

wares to obtain a license at a fee of about $1.50 per day.[137] The Court stated that "[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional."[138] The Court noted that dissemination of religious literature and preaching in the streets is accorded the same level of protection as worshiping in churches.[139]

C. The IRS's Regulation Implementing § 501(c)(3) Violates the First Amendment Under the Smith *Hybrid Claim*

Under the framework created by the *Cantwell-Murdock-Smith* line of cases, the IRS's application of § 501(c)(3) to religious organizations creates both a colorable free speech claim and a colorable free exercise claim under the First Amendment. This puts the IRS's regulations applying § 501(c)(3) to religious organizations squarely in the crosshairs of a hybrid claim under *Smith*, making it a prime target for ratcheting up the standard of scrutiny.

1. The IRS's Application of § 501(c)(3) Burdens Religious Organizations' Free Speech Rights.—The IRS's application of the § 501(c)(3) limitation on intervening in a political campaign chills both political and religious speech by religious organizations. Certainly, Congress may remove religious organizations from the list of § 501(c)(3) eligible organizations, but it cannot impose unconstitutional conditions on their inclusion.[140] Under the unconstitutional conditions doctrine, the threat of revoking a religious organization's tax-exempt status may be in effect penalizing the organization for its speech and thus unconstitutional.[141] This would be analogous to *Speiser*, in which the Court held unconstitutional the requirement that veterans swear they did not advocate the forcible overthrow of the government as a condition of receiving a tax benefit.[142] In both instances, the tax benefit depends on the taxpayer's forbearance of a constitutional right. While the regulation's burden on speech, alone, may not rise to a constitutional violation, it is at least a colorable claim which is all that is required under a *Smith* hybrid claim.[143]

The IRS's application of the § 501(c)(3) limitation burdens religious

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137. *Id.* at 106.

138. *Id.* at 108.

139. *Id.* at 109 ("This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion."). The Court also stated that sincerity of beliefs was not an issue in this particular case, and the fact that the ordinance was nondiscriminatory was irrelevant. *Id.* at 115.

140. *Cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (invalidating the *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328 (1986), reasoning that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" (quoting *Posadas de Puerto Rico Ass'n*, 478 U.S. at 345-46)).

141. Speiser v. Randall, 357 U.S. 513, 518 (1958).

142. *See id.* at 528-29.

143. Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

organizations' free speech rights because such organizations cannot always effectively separate their religious and political speech. While jurisprudence in the area of the unconstitutional conditions doctrine remains uncertain, in *Regan* and *League of Women Voters*, the Court distinguished unconstitutional penalties from constitutional nonsubsidies on the basis of whether the organization's primary activities could be separated from its political activities and channeled into distinct § 501(c)(3) and § 501(c)(4) entities.[144] In *Regan*, where § 501(c)(3) was actually involved, the Court held that the law did not unconstitutionally violate the nonreligious organization's free speech rights because the organization could create a sister § 501(c)(4) organization to carry out its political activities.[145] In *League of Women Voters*, however, a sister § 501(c)(4) organization was not possible, thus the governmental limitation on speech was found unconstitutional.[146] Similar to the organization in *League of Women Voters*, and unlike the organization in *Regan*, religious organizations cannot always effectively segregate their religious messages from their political ones into the communications of separate § 501(c)(3) and § 501(c)(4) entities.[147] For example, if a preacher states in his sermon that members who vote for pro-choice political candidates cannot receive communion,[148] it is difficult to separate the religious from the political messages. The preacher is, in effect, serving a dual role when he makes that assertion.

Similarly, it would be difficult to separate the sources of funding for each component of the statement. While the statement itself costs little to nothing,[149] at issue would be the costs of the preacher's salary and the religious organization's facilities. It would be impractical to require that each component of the statement be stated in different facilities or to try to determine the fraction of the preacher's statement that would be attributed to his § 501(c)(4) salary instead of his § 501(c)(3) salary. This type of religious calculus may be possible when a religious organization places a newspaper advertisement urging Christians not to vote for President Clinton because the entire advertisement is political in nature and there is a separate monetary amount being spent on the speech.[150] However, it is not possible to segregate sources of funding when a

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144. FCC v. League of Women Voters, 468 U.S. 364, 399-400 (1984); Regan v. Taxation With Representation, 461 U.S. 540, 541-51 (1983).

145. *See Regan*, 461 U.S. at 542.

146. *League of Women Voters*, 468 U.S. at 399-400.

147. *Compare id.* (holding that a broadcasting station could not feasibly segregate its editorializing activities from its other activities), *with Regan*, 461 U.S. at 541-51 (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe that organization's free speech right).

148. *Cf.* Hunt, *supra* note 2 (noting that a Catholic cardinal declared that persons wearing rainbow sashes to church to identify themselves as homosexuals would be denied communion).

149. Additionally, because such statements cost little to nothing, the government is no longer really subsidizing political activity. This means that the government interest behind the § 501(c)(3) limitation is at its lowest ebb in these circumstances.

150. *See* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).

religious organization adopts a position that it will not distribute communion to members who vote in a particular way. This is similar to the broadcasting station in *League of Women Voters* being unable to separate its editorializing activities from other activities.[151] In both instances, the organization cannot segregate its activities according to their sources of funding,[152] so the limitation on speech prevents the organization from espousing the political message while retaining its tax benefit. Therefore, similar to *League of Women Voters*, the IRS's application of § 501(c)(3) prevents religious organizations from espousing political messages if they hope to retain their tax-exempt statuses for their religious purposes.[153] This is particularly problematic because political speech has long held an important place in First Amendment jurisprudence. Professor Alexander Meiklejohn, for example, asserted that speech on public issues affecting self-government must be wholly immune from regulation, while private speech is entitled to less complete protection.[154]

The IRS's application of § 501(c)(3) also unintentionally chills *religious* speech by religious organizations. The IRS's application of § 501(c)(3) deters religious organizations from espousing religious messages if they have political undertones. While the IRS might be able to condition the tax-exempt status on refraining from engaging in political speech,[155] it is constitutionally suspect for the IRS to simultaneously hinder religious organizations from espousing religious messages just because they may have political undertones. This is problematic because of the extensive intertwinement of religious and political issues. Since a religious organization may not be able to separate its religious speech from its political speech, it is forced to forego speaking on religious topics that require the incidental mention of what the IRS might consider to be political speech.

Finally, the § 501(c)(3) limitation as applied to religious organizations also chills more speech than was at issue in *Regan*. The tax-exempt organization in *Regan* advocated certain views of income taxation before Congress, the Executive Branch, and the Judiciary.[156] In contrast, the IRS's application of § 501(c)(3) also includes communications between a religious organization and its own members. If a preacher urges his congregation to use its power to stop legal abortions, this involves speech that was not involved in *Regan*. Therefore, the IRS's application of § 501(c)(3) to religious organizations preaching to their own members restricts more political speech than the limitation approved in *Regan*.[157]

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151. *See League of Women Voters*, 468 U.S. at 399-400.

152. *See id.* at 400.

153. *Cf. id.* (holding that a broadcasting station could not feasibly segregate its editorializing activities from its other activities).

154. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 62-63 (1948).

155. *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 541-51 (1983) (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe that organization's free speech rights).

156. *Id.* at 541-42.

157. *Cf. id.* (approving the IRS's revocation of an organization's tax-exempt status where the

More importantly, however, the IRS's application of § 501(c)(3) to religious organizations is more constitutionally suspect than in *Regan* because *Regan* involved a nonreligious organization that is not entitled to the same level of protection that is accorded to religious organizations under the First Amendment.[158]

2. The IRS's Application of § 501(c)(3) Burdens Religious Organizations' Free Exercise Rights.—The IRS's application of the § 501(c)(3) limitation to religious organizations also raises free exercise concerns. Religious organizations that fear losing their § 501(c)(3) tax statuses are forced to refrain from espousing religious messages that may have political undertones because of the increased intertwinement of religion and politics.[159] Commentators have recognized that the IRS interpretation of §501(c)(3) is highly intrusive on free exercise.[160] Churches, for example, must self-censor as they attempt to walk the obscure line between loss of exemption and fulfilling their obligation to speak out on the moral dimensions of important social issues.[161] Some religious organizations even consider their efforts at influencing public policy "an integral part of their religious enterprise[s;] [f]or some religious persons, political activity may even be a form of worship."[162] Consequently, in determining that a message, which is arguably both political and religious, is impermissibly political, the IRS's narrow construction of § 501(c)(3) chills religious organizations' free exercise of religion.

The IRS's application of § 501(c)(3) further infringes on religious organizations' free exercise rights by infringing on the organizations' autonomy. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Supreme Court highlighted the importance of religious organizations' autonomy as part of their free exercise rights.[163] There, a bishop was defrocked by his church.[164] He then asked the Court to hold that his termination was defective under the church's internal regulations.[165] The Court refused, holding that courts cannot constitutionally determine whether church activities are in accordance with church doctrine.[166] It held that to do so would unconstitutionally burden the

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organization was lobbying Congress).

158. *See generally id.*

159. *See* Rosenblum, *supra* note 90, at 542-45.

160. Wilfred R. Coron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 178 (1985).

161. *Id.*

162. Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 396 (1986).

163. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976) (holding that courts would violate the First Amendment if they were to inquire whether the relevant church-governing body has power under religious law to decide disputes).

164. *Id.* at 705.

165. *Id.*

166. *See id.* at 709. The Court stated that permitting courts to determine religious doctrine or "probe deeply . . . into [church matters] would violate the First Amendment" *Id.* (quoting Md. &

organization's free exercise of religion because churches should be free to determine their own policies and doctrine.[167] In determining whether a religious organization's message is political instead of religious—when that message could arguably be categorized as either—the IRS risks infringing upon that organization's free exercise autonomy rights. It is within the religious organization's province to determine the nature of its own message when that message is not clearly political.

While the Supreme Court did place some limitations on a religious organization's right to speak on religio-political issues in *Bob Jones University v. United States*,[168] that case is inapposite here. There, the Court held that a religious educational organization's tax-exempt status could be revoked if it prohibited interracial dating by its students because the organization's policy contravened a compelling governmental interest.[169] The Court explained that an organization with such a policy is at odds with fundamental public policy and is thus not entitled to the tax exemption.[170] The burden on religious liberty was justified because it was "*essential* to accomplish an *overriding* governmental interest."[171] The Court limited its holding, however, by emphasizing that determinations of whether public policy trumps religious rights "should be made only where there is *no doubt* that the organization's activities violate *fundamental* public policy."[172] The Court's holding in *Bob Jones University* should be narrowly construed because of its emphasis that laws against racism are essential to accomplishing an overriding governmental interest.

Unlike the governmental interest at stake in *Bob Jones University*, the public interest in preventing preachers from espousing messages with both religious and political components is not compelling. The prohibition against governmental support of racial discrimination is absolute. In contrast, the government's interest in applying the limitation of § 501(c)(3)—avoiding governmental subsidization of political activity[173]—is not as "overriding" of an interest. In fact, the government does subsidize private political activity in some instances.[174]

Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 (1970)).

167. *Id.*

168. 461 U.S. 574 (1983).

169. *Id.* at 592-93 (holding that a policy banning interracial dating caused the organization not to be "charitable" within the meaning of the statute).

170. *Id.*

171. *Id.* at 603 (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982)) (emphasis added).

172. *Id.* at 598 (emphasis added).

173. Further, the government's intent is not clear with respect to the limitations of § 501(c)(3). *See supra* note 32. Providing deference to religious organizations in determining whether their message is political would not raise additional Establishment Clause issues. As in *Locke v. Davey*, "there is room for play in the joints" between free exercise and establishment concerns. 540 U.S. 712, 718 (2004). See HOPKINS, *supra* note 25, for additional discussion on Establishment Clause concerns raised by § 501(c)(3).

174. *See, e.g.*, I.R.C. § 9034 (2000) (providing government matching funds for political candidates who abide by certain spending limitations); *see also* Richard Briffault, *The Future of*

Further, in situations where the § 501(c)(3) limitation might infringe on religious organizations' autonomy, any subsidization of political activity is often minimal because such private communications between organizations and their members are generally of little to no cost to the government.[175] They are private communications that require no additional expenditure by the organizations.[176]

IV. THE IRS SHOULD DEFER TO RELIGIOUS ORGANIZATIONS WHEN THEIR MESSAGES ARE ARGUABLY RELIGIOUS IN NATURE

Despite these unique concerns that arise when § 501(c)(3) is applied to religious organizations, the statute does not distinguish religious organizations from the other § 501(c)(3) organizations.[177] On its face, this silence regarding religious organizations may indicate congressional intent that the same treatment should be applied to all listed organizations.[178] Judicial preference for avoiding constitutional difficulties, however, favors applying § 501(c)(3) in a manner tailored to the constitutional concerns raised by the *Smith* hybrid claim.[179]

To avoid a *Smith* hybrid claim, the IRS should defer to religious organizations in determining whether their messages are religious in instances when the organizations promulgate messages that are arguably both religious and political in nature. This deference would be consistent with the Supreme Court holding in *Boy Scouts of America v. Dale*.[180] There, the Court held that a New Jersey anti-discrimination law that would require the Boy Scouts to admit a homosexual activist to be a troop leader violated the Boy Scouts's constitutional

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Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002, 34 ARIZ. ST. L.J. 1179, 1214-16 (2002) (arguing that the government should provide each candidate with more public financing than is currently available). Although the government subsidizes candidates' efforts in running for office, and not the organizations supporting such candidates, the fact that any financial support is given to candidates indicates that a governmental purpose of not supporting private political activity is not as fundamental as the governmental purpose of not supporting racial discrimination.

175. *See supra* note 149.

176. *See supra* note 149.

177. *See generally* I.R.C. § 501(c)(3) (2000) (listing religious organizations along with organizations such as those operated for charitable, scientific, or literary purposes).

178. One could argue under the canon of construction *noscitur a sociis* ("it is known by its associates") that religious organizations should be treated in the same way as the other organizations listed in the statute. BLACK'S LAW DICTIONARY 1087 (8th ed. 2004); *see* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 254 (2000) (explaining that *noscitur a sociis* means that lists should be viewed as linking similar concepts).

179. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (suggesting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); ESKRIDGE, *supra* note 178, at 348-54.

180. 530 U.S. 640 (2000).

right of free association.[181] In its analysis, the Court deferred to the organization's assertion that it "teaches that homosexual conduct is not morally straight" and is thus contrary to "Scout Law."[182] The Court stated that it must "give deference to an association's assertions regarding the nature of its expression . . . [and] an association's view of what would impair its expression."[183] It was not for the courts to determine whether a message regarding homosexuality was really a message consistent with the Boy Scouts's principles and purposes.[184] As the *Milivojevich* case illustrates, there is an even stronger case for deference when dealing with religious organizations.[185] Accordingly, courts should defer to religious organizations in determining whether their messages, which may contain both religious and political undertones, are really religious. For example, when a church announces that it will withhold communion from members voting for pro-choice political candidates, courts should accord deference to the church when determining whether this is really a political act. This would allow religious organizations to continue espousing religious messages even though those messages might contain political undertones. It would also allow religious organizations to maintain a level of autonomy in determining the nature of their own messages—an important aspect of the *Milivojevich* decision.[186] Thus, by according deference to religious organizations, the IRS could avoid the invalidation of its application of § 501(c)(3) under a *Smith* hybrid claim.

Clearly, there should be limits on this doctrine of deference, as too much deference will encourage abuse. A religious organization should not be able to simply state that its message, which is clearly political, is religious and thus not a violation of § 501(c)(3). For instance, a religious organization flatly urging members to vote for President Bush should not be able to maintain its § 501(c)(3) tax-exempt status by merely stating that it was a religious message. Instead, religious organizations need only be given deference when their messages are *arguably* both political and religious. This recognizes that religious organizations receive greater constitutional protection than other § 501(c)(3) organizations because of the consideration that they are given under the Free Exercise Clause.[187]

CONCLUSION

As the IRS begins to crack down on religious organizations' possible intervention in political campaigns, religious organizations are altering the nature of the messages they preach to their congregations. Currently, the IRS treats

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181. *Id.* at 651-53.
182. *Id.* at 651.
183. *Id.* at 653.
184. *See id.*
185. *See* Serbian E. Orthodox Diocese v. Milojevich, 426 U.S. 696, 709 (1976).
186. *Id.* at 698; *see supra* note 163.
187. U.S. CONST. amend. I.

religious organizations no differently than other tax-exempt organizations.[188] This general application of § 501(c)(3) does not account for the special First Amendment concerns that arise when a religious organization's activities are at issue. It does not provide adequate protection for religious or political speech or for the free exercise of religion, making the IRS's interpretation of § 501(c)(3) vulnerable under a *Smith* hybrid claim. To avoid these constitutional difficulties, the IRS should defer to religious organizations in determining whether a message that is arguably both political and religious is a religious one. This doctrine of deference will become increasingly important for the survival of religious organizations as political campaigns grow in length and intensity and religion and politics become even more intricately intertwined.

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188. *See, e.g.*, Fund for the Study of Econ. Growth & Tax Reform v. IRS, 161 F.3d 755, 760 (D.C. Cir. 1998) (applying the general interpretation of § 501(c)(3) to an organization dedicated to reforming the U.S. tax system); League of Women Voters v. United States, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (stripping an organization of its 501(c)(3) tax-exempt status because it engaged in excessive lobbying); *see also supra* Part I (outlining the IRS's interpretation of § 501(c)(3) as applied to all § 501(c)(3) organizations).

REFORMING FEDERAL DEATH PENALTY PROCEDURES: FOUR MODEST PROPOSALS TO IMPROVE THE ADMINISTRATION OF THE ULTIMATE PENALTY

ROBERT STEINBUCH*

On March 30, 2006, I testified before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security regarding proposals to revise certain federal procedures for death penalty cases.[1] In my testimony, I discussed four reforms that will improve capital punishment determinations. This Article is a significantly expanded analysis of the recommendations from my congressional testimony.

The Article tracks the process by which death-penalty cases are litigated and offers improvements at each of the key stages during such trials. The Article begins with a discussion of the historical resilience of the death penalty. Next, it discusses jury selection in capital cases and calls for legislative action to correct certain judicial misinterpretation of the "death-qualifying" procedure mandated by statute.

Then, the Article examines the process by which the jury (now death qualified) considers the factors that determine whether a convicted defendant is eligible for the death penalty—i.e., the process of analyzing and deliberating the "aggravating factors." In this section, the Article offers three improvements to this process: first, the Article identifies an anomaly in the federal aggravators that relates to the use of a firearm in a previous felony. Thereafter, it proposes a modification to this statutory aggravator intended to accomplish the existing statutory objective of making the previous use of a firearm a fact that increases the probability that a criminal who later commits a death-eligible homicide will be subject to the ultimate penalty. Second, in the "Aggravating Factor" section, the Article offers a new aggravating factor to address the murder of a witness, juror, or other participant in the judicial and law-enforcement system. Herein, it offers specific legislative language so as to ensure that the application of this new aggravating factor is coherent and predictable. Third, the Article offers a modification to another statutory aggravator, this time the pecuniary-gain aggravator. The proposed change here is designed to address an ambiguity in the application of this aggravator that exists not as a function of judicial departure from statutory language, as we saw with aforementioned firearm aggravator, but,

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1. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress 21 (2006) (statement by Robert Steinbuch, Professor of Law, University of Arkansas at Little Rock).

rather, as a function of the legislative process itself.

The final substantive section of the Article brings us to the end stage of the capital trial and discusses an alternative approach to dealing with hung sentencing juries. The Article concludes with some final remarks.[2]

INTRODUCTION

The death penalty will always be a controversial topic. Proponents of capital punishment have long claimed that it deters crime,[3] and two noted scholars recently have suggested that capital punishment may deter as many as eighteen

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2. Some may argue that, in writing an article such as this, one should explicitly stake out a position on the death penalty. I disagree. The death penalty is complicated in theory and application. Scholars, particularly those invested in the economic analysis of the law, should comment on the efficiency and efficacy of legal procedures without compulsion to explicate theory regarding the underlying system.

3. *See* 141 CONG. REC. 7658, 7662 (June 5, 1995) (statement of Sen. Feinstein) (stating "There has been a lot of discussion as to whether the death penalty is or is not a deterrent. But I remember well in the 1960's when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: 'Why was your gun unloaded?' She said to me: 'So I would not panic, kill somebody, and get the death penalty.' That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent. But the deterrent impact of the death penalty is weakened when it cannot be imposed swiftly after a verdict has been reached in a fair trial. As the Senate Judiciary Committee heard at its hearing on habeas reform last March, the extraordinary delay in carrying out capital sentences is in effect a form of terrorism against the survivors of murder victims, traumatizing them year after year by preventing justice from being carried out."); FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 82-100 (1978); Paul G. Cassell, *In Defense of the Death Penalty*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?: THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 183, 191 (Hugo A. Bedon & Paul Cassell eds., 2004) (quoting Alan Dershowitz: "Of course, the death penalty deters some crimes. . . . That's why you have to pay more for a hitman in a death penalty state, than a non-death penalty state."); Michael A. Cokley, *Whatever Happened to That Old Saying "Thou Shall Not Kill?": A Plea For the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 71 (2001); Christina DeJong & Eve Schwitzer Merrill, *Getting "Tough On Crime": Juvenile Waiver and the Criminal Court*, 27 OHIO N.U. L. REV. 175, 176 n.9 (2001); James M. Galliher & John F. Galliher, *A "Commonsense" Theory of Deterrence and the "Ideology" of Science: The New York State Death Penalty Debate*, 92 J. CRIM. L. & CRIMINOLOGY 307, 318, 319 (2002) (citing New York State Assemblyman Oromack for the proposition that released convicted murderers often murder again; according to Assemblyman Robach, the "number [of recidivist murderers] is at least 200 a year across [New York], if not higher"); Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL'Y 33, 39-41 (1993) (rabbis relied on capital punishment as a deterrent); David Glebe, *Editor's Note*, 21 DEL. LAW. 4 (Winter 2004); Sam Roberts, *Switch by a Former Supporter Shows Evolution of Death Law*, N.Y. TIMES, Feb. 28, 2005, at B1.

murders for every one person executed.[4]

Opponents, on the other hand, often point to an evolving standard of decency that they believe to be inconsistent with capital punishment.[5] In addition to this philosophical objection, opponents of the death penalty articulate pragmatic concerns about the equitable distribution of the sanction and its potential for killing the innocent.[6]

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4. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005). Sunstein and Vermeule recognize that this deterrent varies by region—with the effect either not being demonstrated, or an opposite effect being shown, in some states. *Id.* at 745. Moreover, others certainly disagree with the empirical conclusions of Sunstein and Vermeule. *See, e.g.*, John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (indicating "profound uncertainty" as to whether available data suggests a deterrent effect caused by the death penalty); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1806 (2006) (same).

5. *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) (referring to the evolving standards of decency and also referencing the laws of other nations); Ford v. Wainwright, 477 U.S. 399, 406 (1986) (stating the Eighth Amendment's prohibitions recognize the "evolving standards of decency that mark the progress of a maturing society" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); Weems v. United States, 217 U.S. 349, 350 (1910) (stating the Eighth Amendment "is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787 but may acquire a wider meaning as public opinion becomes enlightened by humane justice"); Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting) (referencing the evolving standards); State v. Scott, 748 N.E.2d 11, 19 (Ohio 2001) (Pfeifer, J., dissenting) ("This court has a chance to take a step toward being a more civilized and humane society. This court could declare that in the interests of protecting human dignity, Section 9, Article I of the Ohio Constitution prohibits the execution of a convict with a severe mental illness. I believe that the 'evolving standards of decency that mark the progress of' Ohio call for such a judicial declaration."); ROBERT LIFTON & GREGG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 219 (2002) (claiming that two-thirds of death penalty opponents are against the death penalty based on moral grounds); Geoffrey Sawyer, Comment, *The Death Penalty Is Dead Wrong:* Jus Cogens *Norms and the Evolving Standard of Decency*, 22 PENN. ST. INT'L L. REV. 459, 459-81 (2004).

6. *See* Kansas v. Marsh, 126 S. Ct. 2516, 2544 (2006) (Souter, J., dissenting); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999); Almanac of Policy Issues, Death Penalty (June 1, 2001), http://www.policyalmanac.org/crime/death_penalty.shtml; Steve Schifferes, *Death Penalty Opponents Struggle On*, BBC NEWS, Jan. 16, 2003, http://news.bbc.co.uk/1/hi/world/americas/2663147.stm; *see also* Furman v. Georgia, 408 U.S. 238, 313 (1972); Trop v. Dulles, 356 U.S. 86, 101 (1958); JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 397-99 (2002); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987) (citing results from their own study that, from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least twenty-three innocent persons were executed); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's*

This debate is predominantly a function of modern political discourse. Historically, capital punishment has been, at best, routine.[7] For example, the Bible lists a host of offenses that were punishable by death, including murder, assaulting a parent, human trafficking, and bestiality.[8] Colonial America also

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Exclusion of Death in the Presence of Lingering Doubt, 21 N. ILL. U. L. REV. 41 (2001); *but cf. Furman*, 408 U.S. at 247 ("Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is*." (quoting *Hearings on H.R. 8414, Before H.R. Subcomm. No. 3*, 92d Cong. 116-117 (1972)) (statement of Ernest van den Haag) (emphasis in original)); Otto Pollak, *The Errors of Justice*, *in* CAPITAL PUNISHMENT 207 (1967) ("To recognize the fallibility of human judgment and still to act, but act wisely in the light to such fallibility, is one of the great challenges of mankind. For this reason the fact of irrevocability has always been among the arguments for the abolition of the death penalty."); James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1651 (2006) (acknowledging that increased recognition that capital punishment was taking the lives of innocent people in some instances was a major catalyst for the slip in public support for the death penalty beginning in the mid-1990s); Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 876 (1987) (arguing that because the deterrent effect of capital punishment is unclear, the issue is a matter of who should bear the risk). If the death penalty is not more effective at deterrence and a murderer is executed, one murderer loses his life for no good reason. *Id.* If, on the other hand, it is more effective at deterring crime and the murderer is not executed, the innocent victims of one who may have been deterred will lose their lives. *Id.* "I'd rather execute a man convicted of having murdered others," concludes van den Haag, "than . . . put the lives of innocents at risk." *Id.* (citing ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY—A DEBATE 69 (1983)); Audiotape: Ray Suarez, *Death Penalty: Talk of the Nation*, *on* NAT'L PUB. RADIO (Feb. 11, 1997) (transcr. # 97021101-211 available in LEXIS, News library, NPRnews file) ("[The death penalty] is inherently an arbitrary and unfair process," says Judge Reinhart (U.S. Court of Appeals for the Ninth Circuit). "[I]t depends on a number of factors, largely, how much money do you have, what kind of lawyer do you have? If you have Johnnie Cochran, you're not likely to be executed. If you have a lawyer in Alabama who has never handled a criminal case before and is paid a maximum of $1,000 to try to investigate the case, try the entire case, your chances of winning, guilty or innocent, are not very good.").

7. *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (stating "[w]hen this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment.").

8. *Exodus* 21:12-17, 22:19. Of course, history equally has demonstrated the existence of opposition to the death penalty. *See, e.g.*, *Matthew* 5:38-39; *John* 8:7. This, however, does not belie the fact that throughout all of history, the death penalty existed somewhere. Interestingly, the United States saw a brief period in which the death penalty was prohibited. Donohue & Wolfers, *supra* note 4, at 792.

adopted the death penalty for myriad crimes, including treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, and theft.[9] Today, although the scope of capital crimes is smaller, a recent movement in federal law has resulted in the increase of the number of crimes subject to the death penalty.[10] Indeed, while the ultimate penalty is not as ubiquitous in this country as it once had been,[11] the United States is, nonetheless, a world leader in the imposition of

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9. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 5 (2002).

10. *See* 8 U.S.C. § 1342 (2000) (murder related to the smuggling of aliens); 18 U.S.C. §§ 32-34 (2000) (destruction of aircraft, motor vehicles, or related facilities resulting in death); *id.* § 36 (murder committed during a drug-related drive-by shooting); *id.* § 37 (murder committed at an airport serving international civil aviation); *id.* § 115(b)(3) (retaliatory murder of a member of the immediate family of law enforcement officials); *id.* §§ 241, 242, 245, 247 (civil rights offenses resulting in death); *id.* § 351 (murder of a member of Congress, an important executive official, or a Supreme Court Justice); *id.* §§ 844(d), (f)(3), (i) (death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce); *id.* § 930 (murder committed by the use of a firearm during a crime of violence or a drug trafficking crime); *id.* § 924(c)(5)(B)(i) (murder committed in a federal government facility); *id.* § 1091 (genocide); *id.* § 1111 (first degree murder); *id.* § 1114 (murder of a federal judge or law enforcement official); *id.* §1116 (murder of a foreign official); *id.* § 1118 (murder by a federal prisoner); *id.* § 1119 (murder of a U.S. national in a foreign country); *id.* § 1120 (murder by an escaped federal prisoner already sentenced to life imprisonment); *id.* § 1121 (murder of a state or local law enforcement official or other person aiding in a federal investigation, murder of a state correctional officer); *id.* § 1201 (murder during a kidnapping); *id.* § 1203 (murder during a hostage-taking); *id.* § 1503 (murder of a court officer or juror); *id.* § 1512 (murder with the intent of preventing testimony by a witness, victim, or informant); *id.* § 1513 (retaliatory murder of a witness, victim or informant); *id.* § 1716 (mailing of injurious articles with intent to kill or resulting in death); *id.* § 1751 (assassination or kidnapping resulting in the death of the President or Vice President); *id.* § 1958 (murder for hire); *id.* § 1959 (murder involved in a racketeering offense); *id.* § 1992 (willful wrecking of a train resulting in death); *id.* § 2113 (bank-robbery-related murder or kidnapping); *id.* § 2119 (murder related to a carjacking); *id.* § 2245 (murder related to rape or child molestation); *id.* § 2251 (murder related to sexual exploitation of children); *id.* § 2280 (murder committed during an offense against maritime navigation); *id.* § 2281 (murder committed during an offense against a maritime fixed platform); *id.* § 2332 (terrorist murder of a U.S. national in another country); *id.* § 2332a (murder by the use of a weapon of mass destruction); *id.* § 2340 (murder involving torture); *id.* § 848(e) (murder related to a continuing criminal enterprise or related murder of a federal, state, or local law enforcement officer); 49 U.S.C. §§ 46502 (2005) (death resulting from aircraft hijacking); 18 U.S.C. § 794 (2000) (espionage); *id.* § 2381 (treason); *id.* § 3591(b)(2) (trafficking in large quantities of drugs); *id.* § 3591(b)(2) (attempting, authorizing or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise, regardless of whether such killing actually occurs).

11. Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 207 (2005) (citing an average of 130 executions per year in the 1940s and seventy-five per year during the 1950s, compared to an average of forty-eight per year in the 1990s).

capital punishment.[12] Additionally, most Americans support the death penalty,[13] and the Supreme Court has established significant precedent holding that capital punishment is constitutional.[14] As such, the death penalty will long continue to be a part of our legal landscape.

While the punishment of death is well ensconced in our society, the procedures by which it is implemented are always evolving.[15] Currently, caselaw interpreting the federal statute that governs the qualification of death-penalty

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12. *See* Kansas v. Marsh, 126 S. Ct. 2516, 2532 (2006) (Scalia, J., concurring) ("There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed.) . . . It is commonly recognized that '[m]any European countries . . . abolished the death penalty in spite of public opinion rather than because of it.' Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. The European Union advocates against the death-penalty even *in America;* there is a separate death-penalty page on the website of the Delegation of the European Commission to the United States. The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment." (citations omitted)); *Slight Fall in Capital Punishment*, THE GUARDIAN (U.K.), Apr. 7, 2004, http://www.guardian.co.uk/international/story/0,3604,1187137,00.html (stating that United States ranked third worldwide in the number of executions during 2003, behind China and Iran). Note, however, that Justice Scalia has cautioned as to the conclusions that can be drawn from the United States' primacy in imposing capital punishment. *Marsh*, 126 S. Ct. at 2532 (Scalia, J., concurring); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006) (discussing the increase of death-row inmates in the United States over the last forty years, while the geography of death-penalty countries internationally has decreased).

13. *See Marsh*, 126 S. Ct. at 2516 (Scalia, J., concurring); David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment without Parole*, GALLUP NEWS SERVICE, June 2, 2004, http://www.deathpenaltyinfo.org/article.php?scid=23&did=1029; Death Penalty Information Center, Facts About the Death Penalty, http://www.deathpenaltyinfo.org/FactSheet.pdf (Sept. 27, 2006).

14. Gregg v. Georgia, 428 U.S. 153, 179-86 (1976) (holding that the death penalty was not per se cruel and unusual punishment as forbidden by the Eighth and Fourteenth Amendments; the Court was heavily persuaded by its conclusion of the death penalty's deterrence effect); *see also* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976), *superseded by Statute*, Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244, *as recognized in* Moore v. Campbell, 344 F.3d 1313 (11th Cir. 2003).

15. *See* Wiggins v. Smith, 539 U.S. 510, 533 (2003) (holding that presentation of reasonably available mitigating evidence is required for effective assistance of council under the Sixth Amendment); Ring v. Arizona, 536 U.S. 584 (2002) (stating that jury, and not the judge, must find the requisite aggravating factors to impose the death penalty); Lockhart v. McCree, 476 U.S. 162, 176 (1986) (holding that prospective juror may be excused "for cause" if the juror's position on the death penalty would impair his or her judgment at the sentencing phase of the trial).

juries needs legislative clarification, and certain statutory "aggravating factors" used to determine the appropriateness of the death penalty in individual cases are in need of reform. Specifically, Congress should: (1) legislatively "reverse" recent caselaw that suggests courts may qualify death-penalty juries after guilt is found; (2) correct the current statutory anomaly that provides for the disparate application of the aggravating factor for a prior conviction of the use of a firearm in the commission of a crime; (3) adopt an aggravating factor for the interference with the administration of justice; and (4) legislatively address caselaw that interprets too narrowly the pecuniary-gain aggravating factor.

Additionally, we should further consider the method by which we deal with hung sentencing juries in capital cases after guilt has already been determined. Texas has adopted an approach in non-capital cases for hung sentencing juries that mimics that which is already done for hung juries during the guilt phase in both federal and state criminal trials—namely, a retrial. Perhaps we should consider the adoption of a similar approach for hung sentencing juries in federal death-penalty cases.

This Article discusses each of these issues *in seriatim* and also offers concluding remarks. The Article is not designed to be an evaluation of the appropriateness of the death penalty. Many have already undertaken that chore and continue to do so. Rather, this Article presents a focused analysis of specific mechanisms used throughout federal death-penalty litigation in order to suggest improvements thereto.

I. JURY QUALIFICATION

Under federal law, juries in federal death penalty cases are called on to determine guilt or innocence, and if the accused is convicted, the jury must then decide whether to impose capital punishment.[16] Given this dual role unique to capital cases, juries in death penalty cases are typically "death qualified."[17] This morbid description refers to the pre-trial determination that the jurors would be willing to impose the death penalty should the law so dictate. In essence, this process is a voir dire by the court to determine whether the jurors will be willing to follow the court's instructions regarding the application of the death penalty.[18] As such, the "qualified" jury is able to sit in both the guilt phase and, if necessary, the sentencing phase of the trial.

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16. 18 U.S.C. § 3593(b) (2000).

17. BANNER, *supra* note 9, at 253-54.

18. A valid inquiry into this approach is to question why similar voir dires are not explicitly done in other criminal (or civil, for that matter) cases. For example, we do not explicitly "incarceration-qualify" jurors sitting on non-death penalty felony cases. This apparent anomaly, however, is not as perplexing as it might initially appear. First, jurors in criminal cases are likely familiar with the potential that their verdicts could result in incarceration. More importantly, though, in non-capital cases, jurors in the federal system do not sentence defendants in any cases other than death penalty cases. Thus, the unique role of the jury in death penalty cases calls for this additional procedure.

In *United States v. Green*,[19] however, the Massachusetts District Court opined that courts could defer death-qualification until after they take a verdict on the issue of guilt or innocence. The court stated that if there were insufficient jurors to constitute a death-qualified jury, then the court would empanel a new jury under 18 U.S.C. § 3593(b)(2)(C)—which allows for a new jury for sentencing if the original jury was discharged for "good cause."[20] This interpretation of § 3593 is contrary to the intent of the statute and misapplies the "good cause" provision.[21] Because the district court did not actually pursue this course of action, the First Circuit on appeal refused to issue an opinion regarding this proposal. Thus, the Massachusetts District Court's interpretation of how to empanel juries in death-penalty cases remains an open question of law in at least the First Circuit. Given the importance of death qualifying juries, Congress should resolve this question in the negative.

Under 18 U.S.C. § 3593(b), the sentencing hearing should be conducted by the jury that determined the defendant's guilt, unless one of four specific exceptions exists that justifies empaneling a new jury.[22] The Massachusetts District Court relied upon one of the four exceptions that relates to situations where the guilt-phase jury has been discharged for "good cause."[23] The intent behind the "good cause" provision centers on addressing situations where an event or circumstance, which occurs after the defendant's guilt has been determined, renders the guilt-phase jury unable to serve during the penalty phase.[24] When combined with the structure of the statute, this supports a conclusion that Congress intended § 3593(b) to be the default rule. That is Congress intended for the jury that determined the defendant's guilt to also determine the sentence, barring some unavoidable circumstance making it impracticable or unfair.[25] Thus, the trial jury should be treated as the sentencing jury, and, as such, the trial jury must be qualified at the outset of the proceedings to be able to fulfill its obligations in the sentencing phase. In addition to

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19. 324 F. Supp. 2d 311, 331 (D. Mass. 2004), *rev'd on other grounds*, 407 F.3d 434, 444 (1st Cir. 2005).

20. *Id.*

21. *See* 18 U.S.C. § 3593(b).

22. *See id.*; United States v. Williams, 400 F.3d 277, 281 (5th Cir. 2005) (holding that district court's order for the case to proceed to trial without a death-qualified jury and assertion that case management problems were sufficient good cause under § 3593(b) violated the plain language of the Federal Death Penalty Act, § 3593, because the Act mandates that the same jury be empanelled for both the guilt phase and sentencing phase of the trial).

23. 18 U.S.C. § 3593(b)(2)(C).

24. *See* Jones v. United States, 527 U.S. 373, 418 (Ginsburg, J., dissenting) (opining that "[d]ischarge for 'good cause' under § 3593(b)(2)(C) . . . is most reasonably read to cover guilt-phase . . . juror disqualification due to, *e.g.*, exposure to prejudicial extrinsic information or illness"); *see also Williams*, 400 F.3d at 281 (holding that the "good cause" pertained to releasing the jury after the conclusion of the guilt phase of the trial, but did not allow the option to bifurcate the jury before the trial as used in § 3593(b)(2)(C)); *Green*, 407 F.3d at 441.

25. *See Green*, 407 F.3d at 441-42.

constituting a strained reading of § 3593, the contrary approach suggested by the trial court in *Green* is illogical and wastes time and resources.[26] Requiring two juries to hear the matter requires a doubling of efforts from empanelling through decision-making. This is an inefficient expenditure of limited judicial resources.

Of course, non-statutory arguments exist for bifurcating the jury qualification for the guilt from jury qualification for sentencing. Namely, death-qualified juries have been shown to have a higher conviction rate than non-death-qualified juries.[27] Proponents of the alternative approach to not death qualify juries (as suggested by the Massachusetts District Court) propose that the higher conviction rate suggests that the death-qualified juries are erroneously convicting the innocent.[28] For this argument to be valid, however, we would need to know whether the death-qualified juries convict innocent defendants. An equally plausible explanation for non-death-qualified juries convicting fewer defendants is that juries comprised of individuals who might not be willing to follow a court's instruction to sentence a defendant to death if certain criteria are met, might also be more likely to similarly ignore the court's instructions during the guilt phase and, therefore, exonerate the guilty.[29] This is not to say that the proponents of the alternative approach could not be correct. They could. They have not established such, however. Absent such a conclusion, courts do not have a basis to overturn the statutory procedure demonstrably established by Congress.

Indeed, pre-qualifying juries is consistent with established Supreme Court precedent. In *Witherspoon v. Illinois*,[30] the Court set forth the important boundaries for juries in death-penalty cases. Therein, the Court held that the Sixth Amendment protects a defendant from a predetermined "hanging jury."[31] Equally, the Court in *Witherspoon* held that prospective jurors are excludable if they would vote against the death penalty irrespective of guilt and culpability or

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26. Lockhart v. McCree, 476 U.S. 162, 180-81 (1986) (having one jury determine guilt and punishment "is as it should be, for the two questions are necessarily interwoven" (quoting Rector v. State, 659 S.W.2d 168, 173 (Ark. 1983)).

27. *Id.* at 170-73 (discussing studies that death-qualified juries are more prone to convict); Liebman & Marshall, *supra* note 6, at 1607 & n.3 (noting Justice Stevens's opposition to the death-qualification procedure "that excludes those with qualms about the death penalty" because it "creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant.") (quoting Gina Holland, *Justice Stevens Criticizes Death Penalty*, ASSOCIATED PRESS, Aug. 7, 2005, *available at* http://www.cvadp.org/news/SPI-20050808.htm); Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 88 (2005) (same).

28. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 62-63 (Mar. 30, 2006) (statement of the author), http://commdocs.house.gov/committees/judiciary/hju26769.000/hju26769_0f.htm.

29. *Id.*; *see also Lockhart*, 476 US at 535-38.

30. 391 U.S. 510 (1968).

31. *Id.* at 523.

if their personal views on the death penalty prevented them from making an unbiased decision regarding guilt.[32] Thus, prospective jurors in death-penalty cases, said the Court, should fit within the margins and be appropriately open to fairly evaluating the facts and sentencing the defendant pursuant to the controlling law if found guilty.[33] *Witherspoon* remains good law and was reaffirmed in *Adams v. Texas*.[34] In *Wainwright v. Witt*,[35] and *Lockhart v. McCree*,[36] then Chief Justice Rehnquist further refined the previous caselaw on qualifying juries for death-penalty trials. Furthermore, in *Morgan v. Illinois*,[37] the Supreme Court provided the same protection on the opposite end of the spectrum by reaffirming the notion that jurors who would automatically vote for the death penalty irrespective of the facts are equally as objectionable.[38] These cases clearly demonstrate the appropriateness and constitutional validity of qualifying juries prior to trial.

Given this established caselaw, the question is begged as to why the *Green* court suggested such a strained reading of the statute to permit the avoidance of pre-qualifying capital-case juries. The obvious interpretation stems from the aforementioned belief that such pre-qualified juries have a greater tendency to convict defendants than juries not subjected to this screening.[39] A court adopting such a view, and hoping to avoid having to impose the death penalty notwithstanding controlling sentencing law,[40] might choose to espouse this

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32. *Id.* at 535-38.

33. *Id.* at 523 n.21.

34. 448 U.S. 38, 40 (1980).

35. 469 U.S. 412, 412-26 (1985) (holding that a juror could not be challenged for cause based on his views about capital punishment unless his views would have prevented or substantially impaired his performance as a juror in accordance with jury instructions and the oath).

36. 476 U.S. 162, 174-77 (1986) (holding that the Sixth Amendment right to an impartial jury requires that the jury represent a random cross-section from the community). This right does not prohibit the exclusion of jurors who refuse to impose the death penalty. The fair cross-section requirement is that distinctive groups categorized by such characteristics as race or ethnicity be fairly represented. Groups categorized by attitudes that prevent them from applying the rule of law may be excluded. *Id.*

37. 504 U.S. 719 (1992).

38. *Id.* at 729.

39. *Lockhart*, 476 U.S. at 170-73; Lillquist, *supra* note 27, at 88.

40. *Cf.* United States v. Williams, 397 F.3d 274, 286 (5th Cir.) (holding that district court "Judge Gilmore's jury instruction appear[s] simultaneously to be preventing the Government from enforcing the death penalty against Williams, while prohibiting any ordinary appellate review of the court's determination. This combination of legislating from the bench and acting as a quasi-defense attorney vis-à-vis the jury is unprecedented and ultra vires."), *cert. denied*, 544 U.S. 911 (2005). The court in *Williams* issued a second opinion, granting the Government's second writ of mandamus and ordering the trial court to empanel a death-qualified jury and try the case. In that case, the Fifth Circuit suggested that "[i]f the District Court "finds itself unable to comply with this order consistent with the court's docket management plans, we are confident that the court will entertain a motion to reassign the cases in order to move this one expeditiously to trial." *Id.* at 283.

reading of 18 U.S.C. § 3593(b) in an attempt to avoid the conviction in the first place.[41] Justice Scalia recognized the use of this technique when he criticized the dissent in the most recent death-penalty case before the U.S. Supreme Court: "The dissent essentially argues that capital punishment is such an undesirable institution—it results in the condemnation of such a large number of innocents—that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced."[42] This, of course, is an illegitimate means to overturn an otherwise legal death-penalty procedure.[43]

The district court, nonetheless, tried the case to a mistrial. United States v. Williams, 449 F.3d 635, 639 (5th Cir. 2006). Upon the government's appeal of the district court's actions during trial, the Fifth Circuit finally reassigned the case after "[h]eeding the plea of the district court regarding her crowded docket and in view of the extraordinary history of this case." *Id.* at 649. After this not-so-subtle action by the Fifth Circuit Court of Appeals, the district court issued an order reassigning the case and stating:

> The Court of Appeals has suggested that this case should be reassigned because this Court is too busy to handle this case. That statement is untrue. When in the course of a trial proceeding, the fairness of the judicial officer is questioned by the Court of Appeals, it is tantamount to a "rear-guard attack." When this occurs, the image of the entire judiciary suffers, and the image of fairness is impaired. Therefore, in the interests of justice, I stand recused from this case.

United States v. Williams, No. 03-0221-11 (S.D. Tex. May 11, 2006).

41. *Cf.* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421 (2002) (suggesting that improving death penalty administration is inconsistent with opposing the death penalty).

42. Kansas v. Marsh, 126 S. Ct. 2516, 2531 (2006) (Scalia, J., concurring).

43. This is not to say that such strategic behavior is solely the province of anti-death penalty advocates. Prosecutors have been accused of using the prequalification procedure to gain an advantage in obtaining a conviction even when the ultimate sentencing goal turned out not to be the death penalty. For example, recall Andrea Yates who killed all five of her children by systematically drowning each of them in the family bathtub. *Newspaper Tell How Mother Allegedly Killed Kids*, CNN.COM, June 23, 2001, http://archives.cnn.com/2001/LAW/06/22/yates.arraignment/. The prosecutor in that Texas case initially sought the death penalty, some have suggested, "to pepper the jury with law-and-order, tough-on-crime types." Andrew Cohen, *Death May Not Be Prosecutor's Aim*, CBS NEWS, Mar. 15, 2002, http://www.cbsnews.com/stories/2002/03/14/opinion/courtwatch/main503787.shtml.

> Now that they've gotten Yates convicted of two capital murder charges, however, the prosecutors have turned into pussycats. Instead of continuing their aggressive pursuit of "justice" and "deterrence," they signaled jurors through a morning of virtual inactivity during the punishment phase of the trial that life instead of death wouldn't be the worst decision these jurors have ever made in their lives.

Id. If prosecutors seek the death penalty during the guilt-phase of a trial solely to "stack" the jury with individuals more likely to convict, and then abandon the pursuit of capital punishment upon conviction, de jure or de facto, this too is an abuse of procedure.

II. AGGRAVATING FACTORS

The U.S. Supreme Court has repeatedly held that death penalties must be carefully defined to narrow a sentencer's discretion to impose the sanction.[44] In the federal system, this prerequisite is manifested in the requirement that the jury find "aggravating circumstances."[45] The death penalty may not be imposed merely upon conviction for certain crimes,[46] but rather, may only be imposed after rationally narrowing the potential recipients based upon an individualized assessment of each defendant and his or her actions and circumstances.[47] That is, the defendant must have committed some wrong above the underlying crime (espionage, treason, homicide, killing during the commission of certain drug offenses, and killing in furtherance of a continuing criminal drug enterprise, in the federal system) that justifies the imposition of capital punishment.[48] Any aggravating factor may be offset with "mitigating factors."[49] The Supreme Court

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44. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 304 (1987); Gregg v. Georgia, 428 U.S. 153, 198 (1976) (finding that "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)); Furman v. Georgia, 408 U.S. 238 (1972) (holding state statutes granting juries unfettered discretion to impose or the death penalty violate the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments).

45. *See* 18 U.S.C. § 3592 (2000) (listing aggravating factors currently to be considered at the federal level in determining whether the death penalty is justified); *cf.* 18 U.S.C. § 3593(d) (2000) (requiring that the jury unanimously find at least one aggravating circumstance before returning a death sentence); *McCleskey*, 481 U.S. at 304-05; United States v. Johnson, 403 F. Supp. 2d 721, 843 (N.D. Iowa 2005); Starling v. State, 882 A.2d 747, 756 (Del. 2005), *cert. denied*, 126 S. Ct. 1453 (2006); State v. Martinez, 115 P.3d 618, 625 (Ariz.), *cert. denied*, 126 S. Ct. 762 (2005).

46. Walton v. Arizona, 497 U.S. 639, 652 (1990), *overruled on other grounds*, Ring v. Arizona, 536 U.S. 584 (2002).

47. *See* Graham v. Collins, 506 U.S. 461, 484-89 (1993) (Thomas, J., concurring); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

48. Kansas v. Marsh, 126 S. Ct. 2516, 2541 (Souter, J., dissenting); *see Graham*, 506 U.S. at 484-89 (Thomas, J. concurring); *see also Roper*, 543 U.S. at 568.

49. *Roper*, 543 U.S. at 551; Blystone v. Pennsylvania, 494 U. S. 299, 307 (1990); *Marsh*, 126 S. Ct. at 2523-25. While

> the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. . . . Together, our decisions in *Furman v. Georgia* and *Gregg v. Georgia* (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned,

recently held that the "Kansas' death penalty statute, consistent with the Constitution, [permits the] imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise."[50] Under current federal law, the statutory aggravators vary by crime.[51]

> individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed.

Id. (citations omitted).

50. *Marsh*, 126 S. Ct. at 2519.

51. 18 U.S.C. § 3592 (2000). For espionage and treason, the following factors are statutory aggravators: (1) the defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law; (2) in the commission of the offense, the defendant knowingly created a grave risk of substantial danger to the national security; and (3) in the commission of the offense, the defendant knowingly created a grave risk of death to another person. *Id.* § 3592(b).

For homicide, the following factors are statutory aggravators: (1) the death, or fatal injury, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense of: (a) the destruction of an aircraft or aircraft facilities, (b) the destruction of motor vehicles or motor vehicle facilities, (c) violence at international airports, (d) violence against Members of Congress, Cabinet officers, or Supreme Court Justices, (e) violence by prisoners in custody of institution or officer, (f) gathering or delivering defense information to aid foreign government, (g) "transportation of explosives [via] interstate commerce," (h) "destruction of [g]overnment property [through] explosives," (i) killing by "prisoners serving life term," (j) "kidnapping," (k) "destruction of property [that affects] interstate commerce by explosives," (l) "killing or attempted killing of diplomats," (m) taking of hostages, (n) crashing trains, (o) maritime and "maritime platform violence," (p) "international terrorist acts against U.S. nationals," (q) "use of weapons of mass destruction," (r) "treason," or (s) "aircraft piracy;" (2) "previous conviction of violent felony involving firearm . . . [f]or any offense, other than an offense for which a sentence of death is sought on the basis of [18 U.S.C. § 924(c)]"; (3) the defendant has a "previous conviction . . . for which a sentence of death or life imprisonment was authorized"; (4) "the defendant has previously been convicted of [two] or more [f]ederal or [s]tate offenses, punishable by . . . more than [one] year [in prison], committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person"; (5) "the defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to [people other than the actual] victim of the offense"; (6) "[t]he defendant committed the offense in an [particularly] heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim"; (7) "[t]he defendant procured the commission of the offense by payment, or promise of payment, of [some form] of pecuniary value"; (8) "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of [some form] of pecuniary value"; (9) "[t]he defendant committed the offense after substantial planning and premeditation to [kill someone] or commit an act of

The aggravating factors demonstrate that the elements that determine whether an individual is subject to the death penalty are haphazard at best.

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terrorism"; (10) "[t]he defendant has previously been convicted of [two] or more [s]tate or [f]ederal offenses punishable by . . . more than one year [in prison,] committed on different occasions, involving the distribution of [drugs]"; (11) "[t]he victim was particularly vulnerable due to old age, youth, or [medical condition]"; (12) "[t]he defendant had previously been convicted of [certain parts] of the Comprehensive Drug Abuse Prevention and Control Act of 1970 or had previously been convicted of engaging in a continuing criminal enterprise"; (13) the defendant was involved in a "[c]ontinuing criminal enterprise involving drug sales to minors"; (14) the defendant committed the offense against "[h]igh public officials"; (15) "[t]he defendant had previously been convicted of a crime of sexual assault or crime of child molestation"; and (16) "[t]he defendant intentionally killed or attempted to kill more than one person in a single criminal [incident]." *Id.* § 3592(c); *see also* discussion *infra* Part II.A.

For killing during drug offenses, the following factors are statutory aggravators: (1) a previous conviction for "another [f]ederal or [s]tate offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute"; (2) a previous conviction for "two or more [f]ederal or [s]tate offenses, each punishable by more than one year [in prison], committed on different occasions, involving the importation, manufacture, or distribution of [drugs] . . . or the infliction of, or attempted infliction of, serious bodily injury or death upon another person"; (3) a previous conviction for "another [f]ederal or [s]tate offense involving the manufacture, distribution, importation, or possession of [drugs] for which a sentence of five or more years [in prison] was authorized by statute"; (4) "[i]n committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly [aided] another to use a firearm to threaten, intimidate, assault, or injure a person"; (5) "[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved" selling drugs to minors under twenty-one; (6) "[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved [selling drugs] near schools"; (7) "[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved . . . using minors in trafficking"; and (8) "[t]he offense involved the importation, manufacture, or distribution of [drugs], mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant." 18 U.S.C. § 3592(d).

> [Note that p]rior to the [Patriot] Act [Reauthorization], federal law provided two sets of death penalty procedures for capital drug cases, the procedures applicable in federal capital cases generally, 18 U.S.C. 3591-3598, and the procedures specifically applicable in federal capital drug cases, 21 U.S.C. 848. The two procedures are virtually identical according to *United States v. Matthews*, 246 F. Supp. 2d 137, 141 (N.D.N.Y. 2002). Section 221 of the Act eliminates the specific drug case procedures so that only the general procedures apply in such cases. According to the conference report accompanying H.R. 3199, this "eliminates duplicative death procedures under title 21 of the United States code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions."

BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 32 (2006), http://www.fas.org/sgp/crs/intel/RL33332.pdf.

Consequently, what should constitute an aggravating factor remains the subject of much debate and controversy.[52] Below, I suggest modest modifications to two of the many existing aggravators, as well as the addition of one more statutory factor to the varied list.

A. Pecuniary-Gain Aggravator

Currently, § 3592(c)(8) provides that the pecuniary-gain aggravator exists when "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of receipt, of anything of pecuniary value."[53] Some courts have interpreted this in a manner that precludes the Federal government from applying this factor in cases where the murder is committed after the pecuniary value has been received.[54]

For example, in *United States v. Bernard*,[55] defendant gang members drove around in search of potential carjacking victims, planning to, among other things, acquire the victims' Personal Identification Number ("PIN") for Automatic Teller Machine ("ATM") transactions. The gang members eventually arrived at a local convenience store where they met two youth ministers from Iowa. After

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52. State v. Breton, 562 A.2d 1060, 1063 n.6 (Conn. 1989) ("Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion . . . [that was] held invalid in *Furman v. Georgia*." (quoting Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988))); Richard A. Rosen, Note, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 943-44 (1986) (opining that aggravating circumstances known as "especially heinous' aggravating circumstances, have generated more controversy than any other aggravating circumstance." (footnotes omitted)); *see Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 5-60 (2006) (statements of Margaret P. Griffey, Robert Steinbuch, Kent Scheidegger, and David Bruck), *available at* http://judiciary.house.gov/Hearings.aspx?ID=135.

53. 18 U.S.C. § 3592(c)(8) (2000).

54. *See* United States v. Bernard, 299 F.3d 467 (5th Cir. 2002); United States v. Cuff, 38 F. Supp. 2d 282, 288 (S.D.N.Y. 1999) ("[Section 3592(c)(8)] appear[s] to be directed at a murder . . . in which pecuniary gain can be expected to follow as a direct result of the crime. A murder from which pecuniary gain does not directly result would not appear to be within the reach of the statute."); *cf.* Woratzeck v. Stewart, 97 F.3d 329, 334-35 (9th Cir. 1996) (construing Arizona pecuniary-gain aggravator as requiring proof "that the killing was done with the expectation of pecuniary gain" and stating further that "[e]ven if it is true that under many circumstances a person who kills in the course of a robbery is motivated to do so for pecuniary reasons, that is not necessarily so" and that "[a] defendant is free to argue that the killing was motivated by reasons unrelated to pecuniary gain"); United States v. Webster, 162 F.3d 308, 325 (5th Cir. 1998) ("[Section 3592(c)(9)] requires a finding that 'the defendant committed the offense after substantial planning and premeditation to cause the death of a person,'. . . obviously directing the premeditation to causing death and not to mere commission of the offense when the two diverge.").

55. 299 F.3d 467 (5th Cir. 2002).

successfully soliciting a ride from the youth ministers, the gang members forced the couple at gunpoint to drive to an isolated location, where they robbed them, acquired the couple's ATM PIN, and then forced them into the trunk of the car. The gang members then attempted to withdraw money from the ATM, drove the couple to an isolated spot, shot them in the head, and burned the car.

The court held that evidence in the case was insufficient to support the pecuniary-gain aggravator because "the application of the 'pecuniary gain' aggravating factor is limited to situations where 'pecuniary' gain is expected to follow as a direct result of the [murder]."[56] The court reasoned that the motivation for the robbery was pecuniary gain while the motivation for the murder, in contrast, was to prevent the robbery from being reported.[57] While the proposed aggravating factor for the interference with the administration of justice discussed below would apply to these facts, the existing aggravating factor for pecuniary gain, nonetheless, need not be subjected to the excessively narrow interpretation found in *Bernard*. If the murder involved a financial motive, either direct or derivative, this should be sufficient to constitute a pecuniary-gain aggravator. The interpretation in *Bernard*, unfortunately, draws completely the opposite conclusion.

In contrast to *Bernard*, other courts have taken a broader view of the pecuniary-gain aggravator. For example, in *United States v. Barnette*,[58] the defendant sought to commit a carjacking in order to secure transportation for the purposes of killing his estranged ex-girlfriend. The defendant hid in the bushes at a road intersection, waited for a car to stop, walked up to the window with a sawed-off shot gun, forced the driver from the vehicle, shot and killed the driver on the side of the road, and left with the vehicle.[59] The Fourth Circuit held that the pecuniary-gain aggravator was applicable because the "gain" of the transportation had a financial value.[60]

Unlike the departure from clear statutory language seen in the *Green* court in Part I of this Article, here the disparate rulings are a function of ambiguity in the statute itself. Given the authoritative split, however, Congress should act to provide one consistent approach for the application of this statutory aggravator—allowing for equal treatment of all criminal defendants. Accordingly, we must evaluate which approach is better—that of the *Bernard* court or that of the *Barnette* court. In comparing the criminal conduct in *Barnette* with that in *Bernard*, the greater moral culpability rests with the defendant in *Bernard*. In *Bernard*, the attack is equally upon society and the victim. In *Barnette*, however, society is impacted secondarily to the victim. As such, the pecuniary-gain aggravator would serve a greater social end if it uniformly covered behavior such as that which occurred in *Bernard*. Congress, therefore, should legislatively reverse the *Bernard* decision to ensure that the

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56. *Id.* at 483 (quoting United States v. Chanthadara, 230 F.3d 1237, 1263 (10th Cir. 2000)).

57. *Id.* at 483.

58. 390 F.3d 775 (4th Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 92 (2005).

59. *Id.* at 781.

60. *Id.* at 785.

pecuniary-gain aggravator covers murders in which the financial motive is derivative in addition to those that are direct.

B. Aggravating Factor for Interfering with the Sound Administration of Justice Through Wrongdoing

In order for our justice system to work effectively and with legitimacy, deliberate wrongdoing to procure the unavailability of a witness or other participant in the judicial and law-enforcement system cannot be tolerated.[61] Such behavior, as the United States Court of Appeals for the Second Circuit has said, "strikes at the heart of the system of justice itself."[62] The murder of a law enforcement informant or witness in a federal or state prosecution because of his/her status as such is not only abhorrent on its own, but sends the message to criminals that sufficient wrongdoing could actually allow them to escape punishment.[63] Similarly, the murder of a jury member or a jury member's family creates a vast chilling effect on the willingness of honest citizens to perform their civic duty in the most important cases before our courts.[64] As such, tampering with, or retaliating against, a witness, victim, or an informant, resulting in death should be the archetypal statutory aggravating factor.[65]

The potential beneficial outcome in the eyes of criminals of avoiding criminal liability by killing witnesses and other relevant actors in the legal system creates a positive incentive for criminals to pursue this risky and socially

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61. *Cf.* FED. R. EVID. 804(b)(6) (defendant forfeits the right to object to hearsay statements when the declarant is made unavailable because the defendant has prevented him from testifying.); H.R. 4472, § 714, 109th Cong. (2006) (as introduced in House on Dec. 8, 2005) (inclusion of intimidation and retaliation against witness in state prosecution as basis for federal prosecution).

62. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

63. Alvarado v. Superior Court, 5 P.3d 203, 222 n.15 (Cal. 2000) (noting that due to witness intimidation, prosecutors in Los Angeles County have been unable to secure testimony from witnesses in over 1000 gang-related murders); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14-15 (2001) (noting that would-be criminals weigh risk versus "reward" before engaging in criminal behavior); Maura Dolan, *When Naming Witnesses Means They'll be Killed*, L.A. TIMES, July 23, 2000, at A1 (reporting that prosecutors contend they often have trouble convicting murderers because witnesses are too scared to testify); Ted Rohrlich & Fredric N. Tulsky, *Efforts to Protect Witnesses Fall Short in L.A. County*, L.A. TIMES, Dec. 23, 1996, at A1.

64. *See* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 126-27 (1996) (noting many are anxious about participating in a trial for fear of retribution by defendant; in one survey, eighty-four percent of those questioned believed that jurors in any criminal case should be granted anonymity as a means of protection).

65. Federal prosecutors use the "future dangerousness" consideration allowed in *Jurek v. Texas*, 428 U.S. 262, 272-273 (1976), to allow the jury or judge to consider like behavior, but this may only be used if at least one statutory aggravating factor is present. Also, this evaluation does not act as a complete proxy for the consideration of the interference with the sound administration of justice through wrongdoing and leaves unconsidered certain behavior that should be examined during the aggravating factor portion of the penalty phase of a federal death-penalty case.

devastating behavior.[66] In order to create a balancing disincentive for such behavior, the costs of such behavior to criminals must be significant.[67] Because of the flagrant nature of these offenses and the heightened interest of the government in deterring such action,[68] adding such behavior to the category of the statutory aggravating factors is appropriate. Indeed, the very same rationale led to the recent change in the Federal Rules of Evidence to permit the admission of hearsay statements because the witness was made unavailable as a result of this type of criminal wrongdoing,[69] and the Supreme Court has held that such a rule passes constitutional muster.[70] Criminals must properly internalize the

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66. Jennifer Walwyn, Comment, *Targeting Gang Crime: An Analysis of California Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. REV. 685, 688 (2002) (citing Letter from Donne Brownsey, Representative, California Public Defenders Association, to California State Assembly Member Tom J. Bordonaro, Jr.); Lynn McLain, *Commentary: UB Viewpoint—Defuse Attempts to Stop Snitchin'*, DAILY RECORD (Baltimore, Md.), Jan. 7, 2005, at Commentary 1 (stating that exclusion of out-of-court statements as hearsay creates a huge incentive to make witnesses disappear); Ken Bakke, *Sometimes Just OK Is Good Enough*, PLAIN DEALER (Cleveland, Ohio), Sept. 2, 1993, at 7B (opining that a robber has an incentive to kill the witness when the punishment for robbery and murder are the same); *cf.* Corey Rayburn, *Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1160 (2004) ("Sexual abuse cases are already among the most difficult for prosecutors to try. The 'child victims are usually the key witnesses . . . [and] their testimony is likely to be indispensable to the conviction of the person who committed the crime.' Given that the rapist of a child does not incur an extra penalty when he or she is already eligible for execution, the incentive to kill the sole witness to the crime is a low risk, high reward scenario. This equation is fundamentally depraved, but it is the notion that underlies deterrence. That is, a would-be criminal assesses consequences and risk versus 'reward' before engaging in criminal behavior. Thus, whatever deterrent effect the death penalty would have for would-be rapists, it would be more than offset by the number of murdered children that would result from the incentive to kill the only witness.").

67. *The McLaughlin Group* (NBC television broadcast June 29-30, 2002) ("[T]he death penalty will deter a criminal from committing another murder to silence a witness.").

68. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert Steinbuch), *available at* http://judiciary.house.gov/Hearings.aspx?ID=135.

69. FED. R. EVID. 804(b)(6); *see also* United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996). The federal death-penalty statute itself explicitly authorizes capital punishment for this behavior if done during the commission of a drug crime, 18 U.S.C. § 3591(b)(2) (2000), and federal law contains separate death-penalty offenses for killing of a witness, informant or victim (after the fact) to interfere with a judicial proceeding. 18 U.S.C. § 1512 (2000). Yet, paradoxically, if this behavior is done in conjunction with any death-eligible crimes (including this one), this behavior will not satisfy any statutory aggravator. Prohibited behavior simultaneously can form the basis of both substantive crimes and aggravating factors. *Compare* 18 U.S.C. §§ 351, 1114, 1116 (2000), *with* 18 U.S.C. § 3592(b)-(d) (2000). Given that far less egregious behavior serves as statutory aggravators, 18 U.S.C. § 3592(b)-(d) (2005), this anomaly needs to be corrected.

70. Crawford v. Washington, 541 U.S. 36, 62 (2004).

notion that interfering with the judicial system through violence will result in greater punishment, not less.

With this said, adding a new aggravating factor must be done with great care to ensure that the new factor does not introduce the very sort of inconsistency and haphazardness that the above-proposal regarding the previous-pecuniary-gain aggravator seeks to eliminate. As such, the aggravator must be clearly delineated, so as to not be open to abuse and misinterpretation. One possible formulation of this aggravating factor could be as follows: *killing a victim, witness, or law enforcement official during or after the commission of the crime for the express purpose of eliminating that individual as a witness to that crime; the killing of any of these individuals alone may not serve as the evidence that the murder was for the purpose of interfering with the administration of justice.*

C. Previous-Firearm-Conviction Aggravator

Current law embodies a congressionally-created statutory anomaly by barring the government from proving the aggravating factor of "previously [having] been convicted of a [f]ederal or [s]tate offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm as defined in section 921 against another person" where the death sentence is sought based on the commission of a violent or drug trafficking crime while carrying or possessing a firearm that causes death.[71] However, if a defendant commits an offense otherwise punishable by death, for example murder while working in furtherance of a continuing criminal enterprise, under 21 U.S.C. § 848(e) the previous-firearm-conviction aggravator is available.[72]

Thus, under current law, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under §§ 924(c) or (j), he will not be subject to the firearm aggravator. However, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under 21 U.S.C. § 848(e), the firearm aggravator is applicable. If both defendants have satisfied the capital eligibility factors of age and intent, there is no rational basis for allowing the previous state firearm conviction under § 3592(c)(2) to be used to prove a statutory aggravating factor in one case but not the other. Both defendants have committed a capital-eligible crime and both have similar previous criminal convictions. Such an approach is inconsistent and cuts against a policy of deterring the use of firearms in conjunction with all violent criminal behavior. Congress should correct this irregularity.

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71. 18 U.S.C. § 3592(c)(2) (2000); *id.* § 924(c),(j); *see, e.g.*, United States v. Nguyen, 928 F. Supp. 1525, 1532-33 (D. Kan. 1996).

72. *See* United States v. Flores, 63 F.3d 1342, 1351-52 (5th Cir. 1995); United States v. Pitera 795 F. Supp. 546 (E.D.N.Y. 1992) (trying an alleged racketeer with murder while engaged in continuing criminal enterprise to be tried under death sentence provision 21 U.S.C. § 848(e)(1)(A) (2006)); United States v. Garza 77 F.3d 481 (5th Cir. 1995).

III. HUNG SENTENCING JURIES

In addition to the four modest proposals made herein, one final issue regarding the federal death penalty needs discussion: hung sentencing juries. That is, what should be done when a jury that has convicted the defendant of the capital crime cannot agree on whether to default sentence her to death or life in prison? Under current law, the defendant receives a default sentence of life in prison without the possibility of parole—or some lesser sentence if authorized by the underlying criminal statute under which the defendant was convicted.[73] This was most recently observed in the case against Zacarias Moussaoui, the so-called twentieth hijacker from the terrorist acts of September 11, 2001, wherein one juror vote against the imposition of the death penalty stood in contrast to the preference for the imposition of the death penalty by the remaining eleven jurors.[74] As a consequence, Moussaoui received a sentence of life imprisonment without the possibility of parole.

One alternative, recently adopted by Texas for *non-capital* cases, is to treat hung sentencing juries in the same fashion as we treat hung juries in the guilt-phase of trial. If a federal or state jury is hung during the guilt phase of trial, then the jury is dismissed and double jeopardy does not attach.[75] Thus, the defendant is open to retrial should the prosecutor so decide. Texas's adoption of the same approach for sentencing juries in non-capital cases results in a guilty defendant who has a split in the sentencing jury undergoing a new sentencing evaluation by a new sentencing jury.[76] The result of the application of such an approach to the federal death penalty system would be that guilty defendants who otherwise would have received a default sentence of life in prison (or other non-capital sentence) under the existing system would now face the possibility of continued exposure to the death sentence.[77] Over the long run, we must recognize that such

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73. 18 U.S.C. § 3593(d)-(e) (2000); United States v. Peoples, 360 F.3d 892, 895 (8th Cir. 2004) ("[a] hung jury in the penalty phase of a capital trial results in a default sentence").

74. Wikipedia, *Zacarias Moussaoui*, http://en.wikipedia.org/wiki/Zacarias_Moussaoui (last visited Jan. 6, 2007).

75. *See Peoples*, 360 F.3d at 895 ("hung jury usually results in an automatic retrial").

76. TEX. CODE CRIM. P. art. 37.071, § (3)(c) (2006). Unlike in the federal system, Texas allows juries to both adjudicate guilt and sentence convicted defendants in non-death-penalty cases—the latter at the option of the defendant prior to trial. Prior to 1981, if the sentencing jury hung after finding guilt, the *whole* case, both guilt and sentencing, had to be retried. Padget v. Texas, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986).

77. The Supreme Court has already held that double jeopardy does not attach on capital punishment when a sentencing jury is hung in a capital case. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003) (citing Bullington v. Missouri, 451 U.S. 430, 439 (1981)) (holding the Double Jeopardy Clause does not bar a capital offense defendant, who initially received a life sentence without parole due to a hung sentencing jury, from receiving the death sentence at retrial). Death sentence at retrial does not violate the Double Jeopardy Clause when a life sentence without parole was initially imposed statutorily because a statutory sentence does not amount to an acquittal. *Id.* The Double Jeopardy Clause offers protection for an acquittal only when the

a change would likely increase the frequency of the imposition of the death penalty, all else being equal.

The current rule of applying a non-death-penalty sentence when a sentencing jury is hung on the issue of death as the default, however, is philosophically appealing and its continued application may be warranted. The present approach offers an element of protection if some members of the jury have some continued questions regarding guilt, yet nonetheless convict the accused. Thus, this procedure may serve to capture residual doubt left over from the guilt phase. Moreover, if we have ensured that the jury is death qualified—as proposed above, we should be fairly confident that the jurors who have voted against capital punishment did so not due to a political and/or philosophical objection to the penalty, but, rather, as a consequence of a genuine belief in its inapplicability under the given facts.[78] Thus, the existing procedures may offer a modicum of safety to balance against the element of uncertainty that exists in the judicial process.

Moreover, Jewish biblical law observes an interesting rule for the imposition of capital punishment different than both the existing rule or the modified Texas approach. In sentencing during a capital case under Jewish biblical law, a majority of jurors must vote for death for the penalty to be imposed.[79] However, if all jurors vote for death, then the penalty *cannot* be imposed.[80] The rationale is that if there is no question by any jurors as to the application of capital punishment, then perhaps passions have overridden reason in the determination of sentence.[81] Furthermore, under Jewish biblical law, the death-penalty jury is comprised of twenty-three jurors.[82] Thus, unanimity becomes statistically a rarer event. Of course, with all this said, this Article does not suggest that the American system would or should change to permit anything less than an

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proceeding "[is] the hallmarks of [a] trial on guilt or innocence." *Id.* Of course, there are those who disagree with the Supreme Court's decision. *See* Stamenia Tzouganatos, Case Comment, *Constitutional Law/Criminal Procedure—Double Jeopardy Does Not Bar Death at Retrial if Initial Sentence Is Not an Acquittal*—Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), 38 SUFFOLK U. L. REV. 245 (2004).

78. Of course, the death-qualification procedure does not guarantee that jurors are not opposed to the death penalty but have chosen to misrepresent their beliefs during the voir dire process, but it undoubtedly reduces the likelihood of this outcome.

79. PINHAS KEHATI, SANHEDRIN 47 (Aumer Tomaschoff ed., Edward Levin trans., 1994).

80. *Id.* (indicating that a unanimous verdict results in acquittal).

81. *Id.* One Jewish scholar suggests that in biblical times an outcome of a unanimous verdict for death was akin to an electoral candidate receiving nearly 100 percent of the vote, i.e., that such an outcome calls into doubt the legitimacy of the process. ADIN STEINSALTZ, TALMUD—STEINSALTZ EDITION 185 (1996); *see also* Infoshop.org, *Consensus Process*, http://www.infoshop.org/wiki/index.php/Consensus_process ("Many groups consider unanimous decisions a sign of agreement, solidarity, and unity. However, there is evidence that unanimous decisions may be a sign of coercion, fear, undue persuasive power or eloquence, inability to comprehend alternatives, or plain impatience with the process of debate.").

82. KEHATI, *supra* note 79, at 46.

unanimous vote for death before the sanction could be imposed.[83] But, it is nonetheless interesting to see the contrast.

This modified Texas approach that retries sentences when faced with a hung sentencing jury, should be evaluated. Unlike the other proposals in this Article, however, this one is by no means modest. Therefore, I leave that for another day and another Article.

CONCLUSION

The death penalty will remain a controversial and divisive topic. The proposals discussed above will allow courts to apply the sanction more efficiently. Under these proposals courts would empanel juries capable of carrying out their duty of imposing the death penalty if the law so dictates. As such, there will be no bifurcation of juries and repetition of function by duplicative bodies. Moreover, judicial attempts to usurp legislative adoption of capital punishment would be reduced. Second, judges and juries should evaluate as an aggravating factor the commission of murder in any part of a crime that provides a pecuniary gain. Differentiations regarding the timing of murders resulting in gain should not affect the application of this aggravating factor. Third, courts would consider egregious behavior designed to interfere with the administration of justice, such as killing witnesses, as the aggravating factor that it should be. No criminal should be able to murder his way out of a conviction and attempts at such should be viewed as the attacks on our whole judicial system that they are. As such, the consideration of this outrageous behavior should contribute to the judge or jury's determination of the ultimate sentence. Finally, prior convictions for the violent use of firearms should be applied uniformly in determining whether to impose the death penalty. The firearms aggravator is generally considered one of the less controversial factors. So, its disparate application is even more confusing. This anomaly is in need of legislative correction.

Additionally, legislatures should take a second look at how hung juries are resolved during the sentencing phase of a capital case in which guilt has already been determined. Texas offers an interesting model that if applied to capital cases in the federal system may have resulted in a different outcome in the infamous case of Zacarias Moussaoui.

Of course, for those opposed to the ultimate sanction, an improvement in its application may not be viewed as a benefit at all. However, for other Americans the death penalty is acceptable. The development of procedures to ensure that it is carried out in a fair and dispassionate fashion is a logical extension of this philosophy.

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83. A minority interpretation of biblical text actually suggests that the opposite conclusion, *i.e.*, that the acquittal referenced in the text refers to acquitting the court of any further obligation, resulting in the defendant receiving the sentence of death. *Id.* This interpretation, while discussed in the Talmud, is not the accepted one by Jewish scholars. *Id.*

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NOTES

REGULATING COORDINATED COMMUNICATIONS: HOW THE FEC RULES RESTRICT BUSINESS COMMUNICATIONS AND BENEFIT INCUMBENTS

CRAIG A. DEFOE*

INTRODUCTION

Every two years business owners and executives and media personalities attempt to make the transition to politics by running for federal office. Overbroad campaign finance laws can hinder their success. Consider the owner of a successful auto dealership. He stars in the dealership's local television advertisements, which the dealership relies upon to bring in customers and stay profitable. The owner enjoys selling cars, but he always wanted to try his hand in the political arena, confident that his success selling cars would translate into success on the campaign trail. His district's incumbent congressman seems vulnerable, and he decides to run for Congress. However, during the campaign the owner's business success becomes a liability. Though his dealership's advertisements are unrelated to his congressional campaign, in the months before the primary and general elections they could become campaign finance law violations. If he continues to advertise for the dealership, he risks violating campaign finance law and being labeled a cheater by the incumbent. If he ceases advertising, he risks harming his dealership. The dealership owner is forced to choose between selling cars and running for office. This situation is reality for some federal candidates.[1]

The preceding scenario results from the coordinated communications rules drafted and approved by the Federal Election Commission ("FEC"). The Bipartisan Campaign Reform Act of 2002 ("BCRA") forced the FEC to broaden the rules that restrict third parties from coordinating communications with federal candidates.[2] The FEC drafted over-inclusive rules, which now restrict federal

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1. *E.g.*, George Will, Editorial, *Campaign Cops and Car Ads*, WASH. POST, Aug. 22, 2004, at B7 (discussing the 2002 Wisconsin Senate candidate and dealership owner Russ Darrow).

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002). The BCRA is popularly known as the McCain-Feingold Act. *See* Amy Keller,

candidates' legitimate business communications in situations similar to the one recounted above.

The coordinated communications rules exist to prevent candidates from recruiting third parties to pay for communications that serve as de facto political advertisements. If a third party pays for a communication and coordinates it with a federal candidate and circumstances indicate that it will influence a federal election, it is considered a coordinated communication.[3] Coordinated communications are treated as campaign contributions to the federal candidate involved, but if the third party otherwise is barred from making contributions, it is barred from making the communications.[4]

Although these communications must be regulated to close a loophole, the rules sweep too broadly. They bar some candidates' legitimate business communications unrelated to the candidates' campaigns. Regulation of such communications serves no legitimate government purpose, but harms candidates' businesses and campaigns. This problem bypasses incumbents, whose involvement with outside businesses is limited by their role as public servants. However, the problem harms political outsiders who engage in business communications while campaigning—usually challengers.

By barring the business communications of some challengers, the rules impair these challengers' ability to benefit from their business experience and prominence in the community. The rules can injure challengers' campaigns and businesses and can dissuade potential challengers from entering a race. This harm to challengers limits their access to the democratic process, thus benefiting incumbents and further contributing to the incumbency advantage. In this way the rules' overregulation unfairly disadvantages challengers and insulates incumbents from constituents—damaging American democracy.

This problem demands a solution. The coordinated communications rules should be redrafted to provide a safe harbor for legitimate business communications. Such a change would prevent the rules' over-inclusion of legitimate business communications and solve the problem.

Part I of this Note provides a brief overview of the problem presented by the FEC's coordinated communications rules and identifies the class of candidates for federal office likely affected by the problem. Part II explains why coordinated communications are regulated, why the rules changed, and why the FEC adopted the changed rules. Part III focuses on the language of the rules drafted by the FEC following the passage of the BCRA and their effect on candidates in subsequent election cycles. Part IV discusses the challenges made to the post-BCRA rules in federal court and the resulting changes in the rules. Part V discusses why this problem affects political outsiders, usually challengers, and bypasses incumbents. Part VI exposes the extent of the incumbency advantage and explains why that advantage conflicts with the democratic principles of fairness and political accountability. Part VII outlines the factors

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Campaign Reform Foes Cheered by Minnesota Case, ROLL CALL, July 11, 2002.

3. Coordinated and Independent Expenditures, 11 C.F.R. § 109.21 (2005).

4. *Id.* § 109.22.

contributing to the incumbency advantage, and shows how the rules harm challengers by preventing them from counteracting some of those factors. Finally, Part VIII explains how the FEC could solve this problem by adopting rules that explicitly exclude legitimate business communications from regulation.

I. INTRODUCING THE PROBLEM

A. The Coordinated Communications Rules in Brief

The BCRA forced the FEC to broaden the rules on coordinated communications—which it accomplished by creating a three-pronged test to judge whether a communication was coordinated.[5] That test looks at who paid for the communication (the "payment prong"), the content of the communication (the "content prong"), and the conduct of the parties who potentially coordinated on the communication (the "conduct prong").[6]

The payment prong is satisfied when a party other than the candidate or her campaign pays for the communication.[7] Thus, when a candidate's business or employer pays for an advertisement, the payment prong is satisfied. The content prong is satisfied when the communication is public, mentions a candidate for federal office, is directed to voters in that candidate's district, and is made within 120 days of an election.[8] Consequently, if a business owner is running for federal office and appears in the business's advertisements, then those advertisements likely satisfy the content prong when aired within several months of an election. Finally, the conduct prong is satisfied when a candidate or her campaign is materially involved with the third party in the making or distribution of the communication.[9] If a candidate is materially involved in her business's public communications, then the conduct prong is satisfied.

B. The Affected Federal Candidates

As the brief explanation above indicates, the coordinated communications rules can affect some communications entirely unrelated to federal elections. For example, this problem arises when a federal candidate owns a business or occupies a high-ranking position therein and that business bears the candidate's name. If that business relies on advertising, as so many do, it may find itself hamstrung by these rules. Similarly, if a candidate's occupation regularly involves public communications—whether on television, in print, or otherwise—his job may become illegal in the months before the primary and general elections.

This problem results from the language of the content prong—it does not

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5. *Id.* § 109.21(a).
6. *Id.*
7. *Id.* § 109.21(a)(1).
8. *Id.* § 109.21(c)(4).
9. *Id.* § 109.21(d)(2).

require that the communication actually involve a federal election.[10] It presumes that when the payment and conduct prongs are satisfied, and the public communication mentions a federal candidate, is directed to that candidate's voters, and is made within 120 days of an election, then the communicator intends to influence a federal election.[11] However, as noted above, some candidates and their legitimate business communications disprove that presumption.

In such situations, the rules have several effects: (1) they could harm a candidate's campaign by reducing his status within the community; (2) they could harm a candidate's business or professional life by forcing him to curtail his professional obligations and business operations for a chance to run for federal office; and (3) they could prevent an aspiring candidate from entering a federal race. In summary, the FEC rules on coordinated communications potentially harm a candidate's business life, professional life, and campaign.[12] They could also reduce the candidate pool. One common theme runs between all these potential effects: challengers are harmed and incumbents benefit.

II. Reasons Behind the Rules

A. The Purpose of Regulating Coordinated Communications

The Federal Election Campaign Act ("FECA") imposes a set of campaign contribution limitations on individuals, political parties, and political action committees.[13] Such limitations are permissible in order to "limit the actuality and appearance of corruption" in federal elections.[14] However, those entities could circumvent the contribution limitations by coordinating political advertising with third parties who also pay for the advertising, rather than purchasing the advertising directly. FECA's coordinated communications rules seek to close this loophole by treating such coordinated communications as contributions.[15]

In the landmark decision, *Buckley v. Valeo*, the Supreme Court noted that treating coordinated expenditures as contributions would "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting

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10. *Id.* § 109.21(c)(4).

11. *Id.*

12. This problem also raises First Amendment concerns due to the potential limitations on business speech. That problem intensifies when media-related business is involved. This Note will not address the free speech issues raised by the rules' over-inclusion of business communications. However, the rules' free speech implications have been addressed elsewhere. *See* James Bopp, Jr. & Heidi Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way To Regulate Issue Advocacy?*, 1 Election L.J. 209 (2002).

13. 2 U.S.C. § 441a (2005); *see also* Federal Election Commission, Contribution Limits 2005-06, http://www.fec.gov/pages/brochures/contriblimits.shtml.

14. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

15. 11 C.F.R. § 100.52(d) (2005).

to disguised contributions."[16] Again in 2003, the Court in *McConnell v. FEC* reaffirmed the view that tighter regulation of coordinated communications prevents actual and apparent corruption, noting, "[T]here is no reason why Congress may not treat coordinated disbursements for electioneering communications" as contributions.[17] Thus, the FEC regulates coordinated communications in order to close what would otherwise be a gaping loophole in the current regulatory scheme.

B. The Purpose of Changing the Rules

Little more than a year before the passage of the BCRA, the FEC adopted new coordinated communications rules.[18] The FEC drafted these pre-BCRA rules in response to a district court decision calling the FEC's interpretation of coordination "overbroad."[19] The court limited the definition of coordination to cases involving "substantial discussion or negotiation between the campaign and the spender."[20]

The BCRA rejected this narrow coordination standard by repealing the prior set of coordinated communications rules.[21] It directed the FEC to "promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees."[22] However, it offered only minimal guidance to the FEC for redrafting the rules. It provided only that "[t]he regulations shall not require agreement or formal collaboration to establish coordination."[23]

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16. *Buckley*, 424 U.S. at 47. In rejecting a provision of FECA that limited independent expenditures "for express advocacy of candidates made totally independently of the candidate and his campaign," the Court noted:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id.

17. McConnell v. FEC, 540 U.S. 93, 104 (2003).

18. General Public Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138, 76,138-47 (Dec. 6, 2000) (to be codified at 11 C.F.R. pts. 100, 109, 110).

19. FEC v. Christian Coalition, 52 F. Supp. 2d 45, 90 (D.D.C. 1999).

20. *Id.* at 92.

21. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002).

22. *Id.*

23. *Id.* The BCRA also directed the FEC to address several specific situations in the rules, including:

> (1) payments for the republication of campaign materials; (2) payments for the use of

While lacking detail, this BCRA provision represented Congress's intent to expand the definition of coordinated communications.[24] Such an expansion was apparently necessary to ensure that candidates and parties did not use de facto coordination to circumvent the BCRA's new ban on soft money.[25] According to Senator John McCain, one of the bill's sponsors, this provision "represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill."[26] Congress determined such an expansion of the rules was necessary because of their ineffectiveness in prior elections. For example, claims that members of the "labor and business communities had 'coordinated' massive expenditures, illegally, with candidates and political party committees" surfaced after the 1996 election cycle.[27]

C. The Purpose of the Three-Pronged Approach

After settling on the three-pronged approach to regulating coordinated communications pursuant to the BCRA directives, the FEC published a lengthy explanation and justification of the rulemaking process and the final rules.[28] In a very general sense, the FEC explained that "the satisfaction of all three prongs of the test . . . justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions."[29] Of course, the extent to which that statement is true is the subject of this Note and was the subject of several public comments received by the FEC in the rulemaking process.[30]

Only two of the seven public commenters supported the three-pronged approach, while the other five argued that the FEC should "emphasize the actual

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> a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

Id.

24. 148 CONG. REC. S2096, 2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) ("This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill.").

25. *Id.*

26. *Id.* at 2145 (statement of Sen. McCain).

27. Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 FORDHAM URB. L.J. 507, 512 (2005).

28. Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

29. *Id.* at 426.

30. *Id.* The public comments received during the rulemaking process may be found at: Federal Election Commission, Comments on This Rulemaking, http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/comments.shtml (last visited May 21, 2006).

conduct and minimize the importance of any content standard."[31] Those five commenters, including the BCRA's principal sponsors, apparently believed that the focus on content would make the rules under-inclusive.[32] The FEC acknowledged that the content prong could "exclude some communications that are made with the subjective intent of influencing a Federal election."[33] Still, the FEC kept the content prong because "it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election."[34]

Commenter support for the specific content standards varied. Several commenters urged the FEC to look at what the communications actually say, rather than "'external criteria' such as the timing or distribution of the communication."[35] For example, the Democratic National Committee argued: "The farther the standard strays from a secure mooring in 'express advocacy,' the more complex—and constitutionally frail—the application of the coordination rule."[36] The FEC disagreed. It was confident the final content standards "all provide bright-line tests and subject to regulation only those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office."[37] Despite that assurance from the FEC, few laws or rules are tailored perfectly to the problem they address, and the coordinated communications rules are no exception.

III. THE COORDINATED COMMUNICATIONS RULES EXPLAINED

A. Post-BCRA Rules

After the BCRA became law, the FEC began an expedited rulemaking process culminating in the passage of new coordinated communications rules in early 2003.[38] The new rules employed a three-pronged test to determine whether communications were coordinated.[39] Coordinated communications were defined as follows:

A communication is coordinated with a candidate, an authorized

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31. Coordinated and Independent Expenditures, 68 Fed. Reg. at 426.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 428.

36. Letter from Democratic National Committee, Democratic Senatorial Campaign Committee, and Democratic Congressional Campaign Committee to John Vergelli, Acting Assistant General Counsel, Federal Election Commission 4 (Oct. 11, 2002), http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/dnc.pdf.

37. Coordinated and Independent Expenditures, 68 Fed. Reg. at 428.

38. Coordinated and Independent Expenditures, 68 Fed. Reg. at 421.

39. Coordinated and Independent Expenditures, 11 C.F.R. § 109.21(a), *amended by* 71 Fed. Reg. 33,190 (2005).

> committee, a political party committee, or an agent of any of the foregoing when the communication:
> (1) Is paid for by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing;
> (2) Satisfies at least one of the content standards in paragraph (c) of this section; and
> (3) Satisfies at least one of the conduct standards in paragraph (d) of this section.[40]

Thus, a communication is considered coordinated if it satisfies the payment prong from subparagraph one, the content prong from subparagraph two, and the conduct prong from subparagraph three. The payment prong contains the least ambiguity of the three; it simply includes all communications not paid for by the candidate or his committee. The content and conduct prongs, however, require further explanation.

The content prong is satisfied when one of several content standards is met. For example, if a communication republishes the candidate's campaign material, promotes the election or defeat of a candidate, or qualifies as an electioneering communication,[41] then it satisfies the content prong.[42] However, the fourth and most relevant content standard includes:

> A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.
> (i) The communication refers to a political party or to a clearly identified candidate for Federal office;
> (ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

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40. *Id.*

41. Electioneering communications are defined as:
any broadcast, cable, or satellite communication that:
(1) Refers to a clearly identified candidate for Federal office;
(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.
Id. § 100.29(a). The FEC recently amended the definition of electioneering communications. Electioneering Communications, 70 Fed. Reg. 75,713 (Dec. 21, 2005) (to be codified at 11 C.F.R. pt. 100).

42. 11 C.F.R. § 109.21(c).

> (iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.[43]

The fourth content standard refers to public communications, which are defined as

> communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet.[44]

Although the FEC calls these "content standards," that is a misnomer. The fourth content standard ignores the content of the communication, instead focusing on outside criteria like the communication's timing and audience.[45]

The relevant conduct standards cover the following types of communication: those made at the "request or suggestion" of the candidate, those "assented to" by the candidate, those in which the candidate had "material involvement," and those about which the candidate engaged in "substantial discussion."[46] True to the language of the BCRA, the rules also note that communications may fall under these content standards "whether or not there is agreement or formal collaboration."[47]

By definition, any communication that satisfies this three-pronged test "is made for the purpose of influencing a federal election, and is an in-kind

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43. *Id.* § 109.21(c)(4).

44. *Id.* § 100.26. The exemption for internet communications in this definition has been the subject of litigation, legislation, and rulemaking. *See* Shays v. FEC, 337 F. Supp. 2d 28, 111 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005); Rick Klein, *Internet Campaign Exemption Defeated*, BOSTON GLOBE, Nov. 3, 2005, at A1; Internet Communications, 70 Fed. Reg. 16,967 (Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110, and 114).

45. 11 C.F.R. § 109.21(c)(4).

46. *Id.* § 109.21(d). Specifically, regarding material involvement, the conduct prong is met when:

> A candidate . . . is materially involved in decisions regarding:
> (i) The content of the communication;
> (ii) The intended audience for the communication;
> (iii) The means or mode of the communication;
> (iv) The specific media outlet used for the communication;
> (v) The timing or frequency of the communication; or
> (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

Id. § 109.21(d)(2). Thus, if a candidate helped create or appears in her business's communications, then she almost certainly was materially involved with the communication.

47. *Id.* § 109.21(d).

contribution under 11 C.F.R. 100.52(d)."[48] Furthermore, the rules provide that "[a]ny person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication."[49] Corporations are prohibited from making federal campaign contributions or expenditures, including "anything of value."[50] Thus, corporations are barred from making coordinated communications.

Taken alone, the rules on coordinated communications appear daunting. The simple three-prong test becomes more complicated with each additional sub-prong and cross reference. However, the rules are clarified by their application to actual federal campaigns. Those campaigns also show how the rules restrict business communications.

B. The Rules in Action

The new rules first affected the 2004 federal election cycle and produced similar effects in the 2006 cycle. These election cycles offer several examples of the problem this Note addresses—the rules' over-inclusion of legitimate business communications. Several federal candidates were involved in businesses in which they regularly engaged in public communications. Those business-related public communications satisfied the payment prong because they were paid for by the business rather than the candidate.[51] In addition, the communications threatened to satisfy the content prong by triggering the fourth content standard, which covers communications that refer to a federal candidate, and are directed at the relevant electorate before an election.[52] Finally, if the candidate was "materially involved" in his business's public communications, then the conduct prong was satisfied.[53]

Russ Darrow ran for U.S. Senate in Wisconsin in 2004. Ironically, he sought to unseat incumbent and BCRA sponsor, Russ Feingold.[54] Darrow founded a large automotive group bearing his name, which relied on public advertising.[55] Because those television and radio advertisements mentioned the candidate Darrow's name, "the automotive group . . . worried that the ads would have to be taken off the air."[56] Their worries were legitimate; in July 2004 a spokesman for the FEC warned, "'[i]t would appear as if such (car) advertisements might be

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48. *Id.* § 109.21(b).

49. *Id.* § 109.22.

50. Corporate and Labor Organization Activity, 11 C.F.R. §§ 114.1(a), 114(b)(1), 114(b)(2).

51. 11 C.F.R. § 109.21(a)(1).

52. *Id.* § 109.21(c)(4).

53. *Id.* § 109.21(d).

54. Graeme Zielinski, *Folksy Style Has Served Him Well; Car Salesman Darrow Deals to Voters*, MILWAUKEE J. SENTINEL, Sept. 10, 2004, at 1B.

55. *Id.*

56. Graeme Zielinski, *State Group Pressing Case Against McCain-Feingold*, MILWAUKEE J. SENTINEL, Aug. 12, 2004, at 1A.

considered electioneering communications,' and thus prohibited."[57] A Wisconsin newspaper and pundit George Will editorialized against such a prohibition as the controversy grew.[58] Eventually Darrow requested an advisory opinion from the FEC, which allowed the advertisements based on a fact-intensive analysis hinging on the fact that Darrow did not speak or appear in the advertisements.[59] That controversy involved the narrower determination of whether the ads were electioneering communications.[60] Nonetheless, because the electioneering communications satisfy the content prong and because their definition mirrors the fourth content prong, the dealership advertising implicated the coordinated communications rules.[61]

Additionally, Pete Coors, of Coors Brewing Company fame, ran for Colorado's open Senate seat in 2004 against the state's Attorney General, Ken Salazar.[62] During his campaign he planned to "remain firmly at the helm of both the holding company and subsidiary Coors Brewing even though he wo[uld]n't be getting paid."[63] Prior to the campaign Coors regularly appeared in beer commercials, touting Coors beer.[64] But in Colorado, the advertisements could have ran "afoul of . . . the McCain-Feingold Act . . . even if the commercials make no mention of the candidacy."[65] Thus, the company pulled the advertisements.[66] Still, on the eve of the election, Coors was criticized when the brewery ran ads defending its corporate name.[67] A political watchdog group labeled the advertisements "an attempt to help Pete Coors win election to the Senate," and tried to persuade the brewery to pull them.[68] The brewery defended the advertisements and denied coordinating them with Coors' campaign.[69] Coors lost to Salazar in the general election.[70]

The problem arose again in the 2006 election cycle. Andy Mayberry chose to run against the Democrat incumbent in Arkansas's second congressional

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57. Graeme Zielinski, *Name Recognition Cuts Both Ways For Darrow; Campaign Law May Limit Car Dealership Ads*, MILWAUKEE J. SENTINEL, July 9, 2004, at 1A.

58. Editorial, *Common-Sense Campaigns*, MILWAUKEE J. SENTINEL, July 12, 2004, at 10A; *see also* Will, *supra* note 1.

59. 2004 Op. Fed. Election Comm'n 31 (2004).

60. *Id.*

61. *See* 11 C.F.R. §§ 109.21(c)(4), 100.29 (2005).

62. T.R. Reid, *Democrats May Use Results in Colorado as Political Primer*, WASH. POST, Nov. 21, 2004, at A18.

63. John Accola, *Coors to Remain at Helm of Brewery—At No Pay; Company Denies Candidacy Means Family Stepping Back*, ROCKY MTN. NEWS, Apr. 13, 2004, at 1B.

64. *Id.*

65. *Id.*

66. *Id.*; *Political Notes*, WHITE HOUSE BULLETIN, Apr. 13, 2004; Will, *supra* note 1.

67. Rachel Brand & David Kesmodel, *Timing of Coors Co. Ads Called Improper*, ROCKY MTN. NEWS, Oct. 30, 2004, at 3C.

68. *Id.*

69. *Id.*

70. Reid, *supra* note 62.

district.[71] He co-owned two periodicals in which he regularly wrote editorials and commentaries.[72] Mayberry requested an advisory opinion from the FEC regarding his ability to continue publishing the periodicals and writing editorials.[73] The FEC found that he could continue publishing the periodicals and that the news pieces would be exempted from regulation.[74] However, the communications were paid for by Mayberry's business, satisfying the payment prong.[75] Additionally, the fact that Mayberry was "simultaneously, the author of the opinion columns in the Periodicals, the editor of the Periodicals, and a candidate for Federal office" satisfied the conduct prong.[76] Thus, the rules barred any of Mayberry's editorials that satisfied the content standard—including any expressly advocating the election or defeat of a federal candidate and any with Mayberry's byline or picture published within 120 days of an election.[77]

The FEC restrictions quickly took their toll on Mayberry's business. He sold his newspaper in order to "avoid various conflicts that could arise" regarding the rules.[78] That sale "negatively impacted by a substantial amount" his personal financial situation.[79] In addition, the rules forced Mayberry to make some changes to the magazine he published to prevent any potential violation.[80]

Yet another example of this problem arose during the 2006 election cycle. Mike Whalen ran for an open House seat in Iowa, but in the Republican primary his business communications angered opponents.[81] Whalen founded and owned a small chain of restaurants, which was "a central part of his personal history and has been integrated into his congressional campaign."[82] Whalen ran a television advertisement for his restaurants in which he was "feature[d] . . . prominently."[83] Whalen's primary opponent filed a complaint with the FEC regarding the advertisement, alleging that "[t]he themes in the corporate advertising prominently featuring Whalen and the theme put forward by the campaign have been nearly identical."[84] Thus, the complaint alleged, "[s]uch activity is a

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71. *Formicola Planning to Run for Congress*, ARK. DEMOCRAT-GAZETTE, Dec. 31, 2005.

72. 2005 Op. Fed. Election Comm'n 7 (2005).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. E-mail from Andy Mayberry, Candidate, Arkansas 2nd Congressional District, to author (Jan. 12, 2006, 11:27 EST) (on file with author) [hereinafter Mayberry E-mail].

79. *Id.*

80. *Id.*

81. Alexander Bolton, *Candidates to Replace Nussle in a Tussle Over Television Ad*, THE HILL, Dec. 6, 2005, at 3.

82. Ed Tibbetts, *TV Ads Become Issue In Campaign*, QUAD-CITY TIMES, Nov. 12, 2005, *available at* http://www.qctimes.net/articles/2005/11/12/news/local/doc437582de1c25d919646495.txt.

83. Bolton, *supra* note 81.

84. Letter from Carol Earnhardt, Manager, Brian Kennedy for Congress, to Scott E. Thomas,

calculated effort to evade the strict prohibition on corporate contributions to federal campaigns and has resulted in illegal corporate contributions and illegal coordinated communications."[85] This case remains unresolved.

These situations illustrate the problem created by over-inclusive coordinated communications rules. Business owners and executives and media personalities often choose to run for political office. But if the business is engaged in advertising (as many are) or other public communications, and if the business shares its name with the candidate or the candidate appears in the advertising, then the content prong is triggered. With the payment and conduct prongs also easily satisfied in such situations, a candidate is forced to choose between her business or her campaign.

The rules' over-inclusion of business communications creates a recurring problem. The candidates discussed above show that in every election cycle federal candidates will see their business communications proscribed by the coordinated communications rules. Perhaps only a handful of candidates per election cycle will be affected in this way, but those situations are neither isolated nor anomalous. Because federal elections attract high-profile challengers, the problem will recur.

The coordinated communications rules will restrict the business communications of many additional federal candidates. The Supreme Court observed that many challengers are "well known and influential in their community or state."[86] Surely many challengers establish such repute and influence in their community by virtue of their business-related public communications. The above-noted candidates were all involved with the media or business advertising. However, Andy Mayberry was not the only federal candidate with a business and media background.[87] Russ Darrow, Pete Coors,

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Chairman, Federal Election Commission 2 (Nov. 30, 2005), http://www.briankennedy.com/news/20051130.pdf [hereinafter Earnhardt Letter].

85. *Id.* at 1.

86. Buckley v. Valeo, 424 U.S. 1, 32 (1976).

87. One notable federal candidate faced with similar problems, albeit under a prior version of the rules, was Steve Forbes. Forbes owned a majority interest in and was CEO of Forbes Inc., the publisher of Forbes Magazine. Kenneth A. Gross, *Steve Forbes: Candidate or Journalist?*, THE HILL, Sept. 23, 1998, at 30. When running for president in 1996 Forbes continued to author a column in the magazine. *Id.* The FEC initially viewed those columns as "prohibited corporate contributions to the campaign." FED. ELECTION COMM'N, MUR 4305—FIRST GENERAL COUNSEL'S REPORT 3 (1996), *available at* http://eqs.nictusa.com/eqsdocs/000039EF.pdf. The FEC eventually brought suit against Forbes, but chose to withdraw from the suit in 1999. FED. ELECTION COMM'N, STATEMENT OF REASONS FOR VOTING TO WITHDRAW THE COMMISSION'S COMPLAINT IN *FEC V. FORBES, ET. AL.* 1 (1999), *available at* http://eqs.nictusa.com/eqsdocs/00003A06.pdf [hereinafter *FEC V. FORBES* WITHDRAWAL].

Indiana produced another media personality turned politician. Before successfully running for Congress in 2000, Mike Pence hosted his own talk radio program in east-central Indiana named The Mike Pence Show. Danielle Knight, *And Now, Batting Right*, U.S. NEWS & WORLD REP., Apr. 24, 2006, at 26-27.

and Mike Whalen were not the only candidates controlling businesses that bear their names.[88] Other federal candidates affected in similar ways included a radio program host and a named partner in a law firm engaged in advertising.[89] Any candidate who regularly engages in business-related public communications could be affected, including many business owners and professional practitioners who rely on advertising, media personalities, and others. Every two years all members of the House and one-third of the members of the Senate are up for re-election.[90] Future elections will see many more cases of federal candidates adversely affected by the coordinated communications rules.

IV. CHANGES IN THE RULES

A. BCRA Sponsors' Dissatisfaction with the Rules

Although this Note argues that the coordinated communications rules are over-inclusive, the principal sponsors of BCRA felt the opposite. They thought the new rules were under-inclusive and voiced their dissatisfaction early on. They urged the FEC to "emphasize the actual conduct and minimize the importance of any content standard."[91] They feared that the content prong would render the rules under-inclusive, arguing that the payment and conduct prongs alone were sufficient to infer coordination.[92]

The FEC rejected that argument,[93] but the sponsors revived it soon thereafter in *Shays v. FEC*.[94] Christopher Shays, a principal sponsor of the BCRA in the House of Representatives, and another sponsor challenged the FEC's final rules on coordinated communications.[95] Shays specifically attacked the content prong, arguing that the 120-day limitation was insufficient because it would allow coordinated communications outside of that timeframe as long as they did not constitute "express advocacy" or republication of campaign materials.[96] The district court agreed, finding that the BCRA was meant to "enlarge the concept

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88. Eric Dickerson, owner of Eric Dickerson Buick in Indianapolis (not the famed NFL running back), faced a situation similar to Russ Darrow's. *See* Eric Dickerson Buick, http://www.ericdickerson.com (last visited May 19, 2006). He decided to challenge a popular Democratic congressional incumbent. Matthew Tully, *Carson's Foe Has A Colt's Name, Edgy Fan Base*, INDIANAPOLIS STAR, May 12, 2006. He won the Republican primary in 2006 with the help of his business experience and recognizable name. *Id.* But he still faced long odds against the popular Democratic incumbent. *Id.*

89. *FEC v. FORBES* WITHDRAWAL, *supra* note 87, at 4-5.

90. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

91. Coordinated and Independent Expenditures, 68 Fed. Reg. 426 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

92. *Id.* at 427.

93. *Id.*

94. 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

95. *Id.* at 38.

96. *Id.* at 57.

of what constitutes 'coordination' under campaign finance law."[97] Thus, the 120-day limitation in the content prong "would create an immense loophole that would facilitate circumvention of the Act's contribution limits, thereby creating 'the potential for gross abuse.'"[98] The court ordered the FEC to rewrite the rules on coordinated communications.[99]

The FEC appealed *Shays* to the District of Columbia Circuit, which in 2005 affirmed the district court holding regarding coordinated communications.[100] In affirming, the circuit court found that a content prong was permissible, but that the 120-day window was without sufficient justification.[101] It instructed the FEC to more "carefully consider" where to draw the line regarding the content of the communications in order to prevent "evasion of campaign finance restrictions through unregulated collaboration."[102] The FEC petitioned for a rehearing en banc with the circuit court on August 25, 2005,[103] which was denied in October 2005.[104]

*B. Post-*Shays *Changes to the Rules*

After the court denied the FEC's request for a rehearing, the FEC proceeded with the rule changes mandated by the *Shays* decisions.[105] Initially, the FEC sought public comments on seven different alternatives for the new content prong of the coordinated communications rules.[106] The Commission later sought a second round of public comments regarding data it gathered on the timing of campaign advertisements in federal elections.[107] The rulemaking process

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97. *Id.* at 64.

98. *Id.* at 65 (quoting Orloski v. FEC, 795 F.2d 156, 165 (1986)). The district court invalidated the rules "pursuant to step two of the *Chevron* analysis." *Id.* The *Chevron* analysis involves a two step inquiry:

> At step one, we inquire whether Congress "has directly spoken to the precise question at issue," in which case "we must give effect to the unambiguously expressed intent of Congress." If the statute is silent or ambiguous on the issue we will defer at step two to any reasonable agency interpretation.

Castro v. Chicago Hous. Auth., 360 F.3d 721, 727 (2004) (citations omitted) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 842-43 (1984)).

99. *Shays*, 337 F. Supp. 2d at 130.

100. Shays v. FEC, 414 F.3d 76, 102 (2005).

101. *Id.*

102. *Id.*

103. Press Release, Federal Election Commission, FEC Files Petition For Rehearing in *Shays v. FEC* (Aug. 29, 2005), http://www.fec.gov/press/press2005/20050829Shays Rehearing.html.

104. Alexander Bolton, *It's Back to Square One for the FEC*, THE HILL, Oct. 25, 2005, at 1.

105. Press Release, Federal Election Commission, FEC Describes Plans for Rulemakings (Nov. 3, 2005), http://www.fec.gov/press/press2005/20051103shays.html.

106. Coordinated Communications, 70 Fed. Reg. 73,946 (Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

107. Press Release, Federal Election Commission, FEC Seeks Comment on Political

concluded on April 7, 2006 at an open meeting of the Commission. At that meeting the commissioners hammered out compromises between two dueling final rule proposals.[108] The changes adopted at that meeting will have little, if any, effect on the underlying problem at issue: over-inclusion of legitimate business communications.

C. The Problem Persists

The rules will continue to restrict legitimate business communications because the FEC failed to either address or remedy the problem at issue.[109] The three-prong approach remains with few substantive changes to any of the prongs. Most of the changes adopted by the FEC will not touch the parts of the rules that create this problem. For example, the rules now stipulate that the conduct prong is not satisfied by substantial discussion between the third party and the candidate if the third party used publicly available information for the communication.[110] The commission also created a safe harbor allowing candidates to endorse each other and convey those endorsements in public communications.[111] Though these changes should reduce the rules' overall level of over-inclusion, they fail to address the main problem.

The content prong underwent only minor changes. The fourth content standard now differentiates between presidential and congressional races. For presidential races, the content prong still is satisfied by public communications within 120 days of an election which refer to a clearly identified candidate and target the relevant electorate.[112] For congressional races, that 120-day window before election is reduced to ninety days.[113] Such a slight reduction in the reach of the content prong will have little effect on the problem. For three months

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Advertising Data in Coordination Rulemaking (Mar. 13, 2006), http://www.fec.gov/press/press2006/20060313coord.html.

108. FED. ELECTION COMM'N, AGENDA DOCUMENT NO. 06-27, MINUTES OF AN OPEN MEETING OF THE FEDERAL ELECTION COMMISSION (Apr. 7, 2006) [hereinafter MINUTES]; Memorandum from Vice Chairman Robert D. Lenhard, Comm'r Steven T. Walther & Comm'r Ellen L. Weintraub to the Fed. Election Comm'n, Agenda Document No. 06-26 (Apr. 7, 2006), *available at* http://www.fec.gov/agenda/2006/mtgdoc06-26.pdf [hereinafter Proposed Rules].

109. MINUTES, *supra* note 108; *see also* Bob Bauer & Donna Lovecchio, *The FEC Has Promulgated New "Coordination" Rules*, MORE SOFT MONEY HARD LAW, Apr. 7, 2006, http://www.moresoftmoneyhardlaw.com/updates/federal_candidates_officeholders.html?AID=682.

110. Proposed Rules, *supra* note 108, at 4, 6-7.

111. MINUTES, *supra* note 108, at 6-7; Proposed Rules, *supra* note 108, at 8. The FEC approved other changes to the rules that will not affect this problem. Bauer & Lovecchio, *supra* note 109.

112. Bauer & Lovecchio, *supra* note 109; MINUTES, *supra* note 108, at 4.

113. Bauer & Lovecchio, *supra* note 109; MINUTES, *supra* note 108, at 4. This change was accompanied by a slight change in the structure of the fourth content prong. That prong is now broken down by the nature of the regulated party, rather than by the individual content requirements. Proposed Rules, *supra* note 108, at 2.

before the primary election and three months before the general election the rules will continue to swallow legitimate business communications.

Although the Commission failed to remedy this problem, its willingness to address other over-inclusion problems offers hope. The FEC acted within BCRA's congressional mandate to narrow the scope of the rules, even though the BCRA sponsors initiated the *Shays* litigation in order to broaden the rules. The FEC should create another safe harbor for legitimate business communications, as it did for candidate endorsements. That solution will be discussed further in Part VIII.

V. WHY INCUMBENTS BENEFIT

The coordinated communications rules apply equally to all candidates, but the business communications they snare come from political outsiders—usually challengers. Congressional rules and realities inhibit incumbents from being involved with business communications. Challengers, however, often come from outside the professional political arena and from inside the business arena. When the rules harm those challengers, incumbents benefit.

A. Incumbents' Limited Business Involvement

Incumbents are professional politicians. They must represent their constituents full-time and their official and unofficial Senate and House duties keep them busy. These congressional duties would make it implausible, if not impossible, for incumbents to be materially involved in an outside business' public communications.

Furthermore, congressional ethics rules virtually eliminate the possibility of incumbents engaging in outside business communications that could be snared by these rules. First, congressmen are barred from earning outside income in excess of fifteen percent of their annual salary.[114] In addition, congressmen generally cannot affiliate with or be employed by any business entity providing professional services which involves a fiduciary relationship.[115] Nor can they

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114. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 905 (2005) (Rule XXV(1)(a)(1)), STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 66-67 (2000) (Rule XXXVI); *see* 5 U.S.C. app. § 501(a)(1) (2005). In the House, outside earned income includes money received from a business in which the member or his family holds a controlling interest, unless "both personal services and capital are income-producing factors" and "the personal services actually rendered by him in the trade or business do not generate a significant amount of income." RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 910 (2005) (Rule XXV(4)(d)(1)D)).

115. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 907 (2005) (Rule XXV(2)); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXVII(5)). These professional services include, for example, "law, real estate or insurance sales, financial services, or consulting or advising." COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, HIGHLIGHTS OF HOUSE ETHICS RULES (2005), http://www.house.gov/ethics/Highlights2005a.htm.

allow any of those business entities to use their name.[116] Congressmen are also subject to more general conflict of interest rules, which limit their involvement with outside businesses.[117] Taken together, these ethics rules preclude members of Congress from involving themselves with private businesses.

The rules of Congress and the practical effects of full time office-holding limit incumbents' involvement with outside businesses. Because of those limitations, incumbents are highly unlikely to engage in public communications coordinated with outside businesses. Incumbents' version of business-related public communications is called news coverage,[118] and the rules cannot limit news coverage.[119]

B. Challengers as Candidates and Businessmen

Challengers often come from outside politics and thus from professions that may involve public communications. Although some challengers come from other elected offices, in Senate and especially in House elections most challengers are not seeking to merely swap elected offices. In the last half-century nearly eighty percent of challengers and fifty percent of open-seat candidates for the House had never before held elected office.[120] Even though prominent members of the community often challenge incumbents, most are political amateurs who could see their business communications affected.

Because challengers likely come from outside the political area, the coordinated communications rules potentially harm their businesses and campaigns. If a challenger comes from a profession that uses public communications regularly, the rules may apply to those communications. For example, Andy Mayberry and Russ Darrow both ran against incumbents and were harmed by the rules. While congressional incumbents are immune to this problem, some of their strongest outsider challengers—successful businessmen with high profiles in their communities—may suffer from the rules' over-inclusion.

The BCRA produces similar problems in open-seat elections, which also involve large numbers of political outsiders. In House elections nearly half of the candidates in such elections were political newcomers.[121] Pete Coors and Mike Whalen both sought open seats when the rules impacted their campaigns. Even though open-seat candidates do not run against incumbents, they often run against office-holders. Over fifty percent of the candidates in open-seat House

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116. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 907 (2005) (Rule XXV(2)); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXVII(5)).

117. *E.g.*, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXXVII(2)).

118. *See infra* Part VI.B.

119. 11 C.F.R. § 100.73 (2005) (exempting news coverage from qualifying as a contribution).

120. GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 37 (5th ed. 2001).

121. *Id.*

elections brought political experience with them.[122] Inevitably, some of those were office holders unaffected by the rules for the same reasons incumbents are unaffected.

Thus, only political outsiders suffer from the damage produced by the rules regardless of whether that outsider is running against an incumbent or for an open seat. Most political outsiders run against incumbents, and incumbents directly benefit when the rules constrain these challengers. However, even in open seat elections outside office-holders benefit indirectly when running against political amateurs who are adversely affected by the rules.

VI. THE INCUMBENCY ADVANTAGE

The coordinated communications add to incumbents' preexisting electoral advantage. The incumbency advantage perpetuates unfairness to challengers and greater disconnects between incumbents and constituents. Any rules that add to the incumbency advantage should be avoided.

A. Evidence of the Incumbency Advantage

Countless studies document the existence of incumbency advantage in congressional elections.[123] Incumbents enjoyed a relatively small advantage in the first half of the twentieth century, but that "rapidly increased during the 1950s and 1960s, and has been relatively high for the past thirty years."[124] That advantage approached ten percentage points on average in recent elections.[125]

Recent congressional elections demonstrate the effects of the incumbency advantage. For example, in 2004 only eight incumbent congressmen running for re-election—one senator and seven representatives—lost their seats in the general election.[126] In House races, almost ninety percent of those incumbents won re-election by "landslide' margins of at least 20 percent."[127] Previous elections produced similar numbers. Only seven House incumbents in 2002 and

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122. *Id.*

123. *See, e.g.*, Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315 (2002).

124. ANDREW GELMAN & ZAIYING HUANG, ESTIMATING INCUMBENCY ADVANTAGE AND ITS VARIATION, AS AN EXAMPLE OF A BEFORE-AFTER STUDY 19 (2004), http://www.stat.columbia.edu/~gelman/research/published/inc6.pdf.

125. *Id.*

126. Rhodes Cook, *The Election of 2004: A First Take*, http://www.rhodescook.com/first.take.html (last visited Mar. 7, 2006). Four of those incumbent losers in the House were Texas Democrats, two of whom were running against Republican incumbents. *Id.* New Republican-drawn congressional districts played a significant role in the failed re-election bids of these Texas Democrats. *See* Robin Toner, *Slim Pickings; Getting Pumped? Get Real*, N.Y. TIMES, Nov. 13, 2005, § 4, at 1.

127. THE CTR. FOR VOTING AND DEMOCRACY, DUBIOUS DEMOCRACY 2005: OVERVIEW (2005), http://www.fairvote.org/?page=1460.

five in 2000 were defeated.[128] The House incumbent re-election rate in the last three federal elections ranged from ninety-six to ninety-eight percent.[129] As noted earlier, this advantage is not merely a recent phenomenon. Indeed, for forty years the re-election rate has hovered around ninety-five percent in the House.[130] Still, the numbers from recent elections show that challengers have much to fear. By one research group's calculations, the last two federal elections were among "the least competitive elections in American history."[131] Challengers clearly face long odds in federal elections.

B. Problems Created by the Incumbency Advantage

The incumbency advantage unfairly disadvantages challengers and reduces elected officials' responsiveness to constituents. The American public's support for term limits evidences its general unease with entrenched incumbents.[132] Most major newspaper editorial boards, even as imperfect barometers of public sentiment, decry the advantages given to incumbents.[133] In a democracy, public opposition to entrenched incumbents, taken alone, indicates that the incumbency advantage is a problem that should be addressed. The reasons for such opposition are rooted in principles of American democracy. Although House incumbents now benefit greatly from the incumbency advantage, the founders envisioned something different.

First, the incumbency advantage unfairly closes the doors of government to potential challengers. Centuries ago James Madison documented the founders' vision that congressional campaigns be open to all. In Federalist No. 52 Madison wrote, "[T]he door of [the House of Representatives] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."[134] Later, the Seventeenth Amendment extended that ideal to the Senate by

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128. Press Release, Campaign Finance Institute, House Winners Average $1 Million for the First time: Senate Winners Up 47%, tbl. 2: House Incumbents and Challengers, Safe and Contested Races 2000-2004 (Nov. 5, 2004), http://www.cfinst.org/pr/110504a.html (follow Table 2 hyperlink). Three of the seven incumbents defeated in 2002 ran against fellow incumbents. *Id.*

129. Toner, *supra* note 126, at 1.

130. David Plotz, *The House Incumbent*, SLATE, Nov. 3, 2000, *available at* http://www.slate.com/id/92692/.

131. THE CTR. FOR VOTING AND DEMOCRACY, *supra* note 127.

132. James Rosen, *Is Time Up On Term Limits?*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 22, 1999, at A25 ("Nationwide, about two-thirds of Americans support term limits for elected officials, according to polls.").

133. *See, e.g.* Editorial, *The Campaign Reform Fraud*, CHI. TRIB., Dec. 7, 2002, at 24 ("The McCain-Feingold campaign finance law is desperately flawed. . . . [A]ll the advantages go to incumbent members of Congress. McCain-Feingold is, if anything, a self-preservation tool for the people who voted to make it law.").

134. THE FEDERALIST NO. 52 (James Madison).

mandating the popular election of Senators.[135] Perhaps the sentiment reflected by Madison's prose is more idealistic than realistic—but that ideal cannot be dismissed. With House races now often reduced to landslide victories for incumbents, the door to the House may not be as open as the framers intended.

The Supreme Court also noted the fundamental unfairness of giving incumbents advantages over challengers. In *Buckley v. Valeo*, the Court expressed its willingness to declare a statute unconstitutional if that statute would "invariably and invidiously benefit incumbents as a class."[136] Such discrimination against challengers would violate the Fifth Amendment Due Process Clause by denying challengers equal protection under the law.[137] The Court's opposition to "restrictions on access to the electoral process" confirms the seriousness of the problem with the coordinated communications rules.[138]

Second, the incumbency advantage can reduce the connection between constituents and their representatives. Madison stressed the importance that Congress be "restrained by its dependence on its people."[139] Biennial elections for Representatives were intended to ensure "a due connection between" the people and their representatives, thus securing for the people "every degree of liberty."[140] Madison envisioned a close connection between constituents and congressmen, but when re-election is assured the connection wanes.

Congress members' incentive to be responsive to their constituents surely decreases when their incumbent status all but guarantees re-election. Ninety-four House incumbents running for re-election in 1998 faced no major party challengers.[141] In uncontested races, voters are left with no real choice. Elections become mere formalities, and incumbents need not rely on the people. Although some incumbents probably are re-elected precisely because of their responsiveness to constituents, many factors that contribute to the incumbency advantage are unrelated to incumbents' interaction with constituents. The job security incumbents derive from these factors would allow them to depart from their constituents' ideological preferences without suffering at the polls. By closing the doors of government to challengers and constituents, the incumbency advantage damages democracy.

VII. NEUTRALIZING THE INCUMBENCY ADVANTAGE

The coordinated communications rules add to the incumbency advantage by barring challengers from taking advantage of their status within the community. Incumbents benefit from several systemic factors in elections and also from their

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135. U.S. CONST. amend. XVII.

136. Buckley v. Valeo, 424 U.S. 1, 32 (1976).

137. *Id.* at 93 ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

138. *Id.* at 94.

139. THE FEDERALIST NO. 52 (James Madison).

140. *Id.*

141. JACOBSON, *supra* note 120, at 48.

status within their communities. Challengers appearing in legitimate business communications could neutralize incumbents' community status advantage. Those legitimate business communications could indirectly convey to voters the challenger's qualifications for office and increase the challenger's name recognition. However, the rules limit the ability of challengers to fight the incumbency advantage in that manner.

A. Advantages Unrelated to Community Status

Incumbents enjoy several systemic advantages that contribute to the overall incumbency advantage, including gerrymandered districts, fundraising capabilities, the congressional seniority system, and declining party affiliation among voters. Even the most well-known challenger often cannot combat the advantages incumbents derive in these areas because these factors are largely unrelated to community status. Therefore, these factors automatically disadvantage challengers.

Critics frequently cite gerrymandering as a main cause of incumbency advantage. Incumbents usually bear the responsibility of redrawing district lines, and they can use that power to draw less competitive districts and protect their seats.[142] Because congressional districts are usually drawn by incumbents,[143] commentators presume that they are drawn to protect incumbents.[144] Some studies attempt to gauge the impact of redistricting on incumbency advantage. One such study compared the results of congressional elections in 2000 and then in 2002, after most districts were redrawn.[145] According to the study, thirty-seven of the total forty-six competitive districts in 2000 became safer for incumbents in 2002.[146] Another study estimated that the redistricting that occurred between 2000 and 2002 made three quarters of the marginal congressional districts safer for incumbents.[147]

Though supporters billed the BCRA as a measure to level the playing field in fundraising,[148] incumbents maintained their huge fundraising advantage in

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142. *Id.*

143. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000 app. D (1999), http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Apdauth.htm.

144. *See, e.g.*, Editorial, *Incumbents Shake Their Money Tree*, N.Y. TIMES, Nov. 2, 2005, at A28 (noting the power of political parties "to gerrymander legislative lines to grossly favor incumbents").

145. VOTING AND DEMOCRACY RESEARCH CTR., *Redistricting and Incumbent Protection in 2001-2002*, http://www.fairvote.org/?page=715 (last visited Mar. 7, 2006).

146. *Id.*

147. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003).

148. David S. Broder, Editorial, *Reform: The Doubt . . .*, WASH. POST, Apr. 3, 2001, at A21 (noting the BCRA authors' attempt to "'level the playing field' for all those involved in the political game")

2004.[149] On average, House incumbents in 2002 who won competitive races also won the fundraising battle by a count of $1.2 million to the challengers' $700,000.[150] In 2004, that gap widened with incumbents pulling in $1.6 million compared to the challengers' stagnant total of $700,000.[151] Even when challengers beat incumbents in 2004 they were out-fundraised by over $400,000.[152] The fundraising numbers for Senate races mirror those of House races.[153] These numbers demonstrate that the incumbency fundraising advantage can hinder even the most viable challengers.

Because the congressional power structure rewards seniority, voters favor incumbents in order to gain more powerful representation in Congress. All incumbents enjoy some level of seniority, whereas newly elected challengers start with none.[154] Seniority in Congress is tied to power, which can benefit constituents.[155] Thus, the seniority system adds an incentive for voters to choose incumbents.[156] The 2004 Senate primary in Pennsylvania battle between incumbent Arlen Specter and challenger Pat Toomey illustrates this point. Specter had over twenty years of Senate experience and was in line to chair the Senate Judiciary Committee.[157] Though Toomey was considered more ideologically in line with the primary voters, Specter touted his seniority.[158] Specter emerged victorious from the primary.[159] That campaign demonstrates the power of incumbent seniority over voters.

Finally, incumbents benefit from declining party affiliation among voters. Voters who feel less attachment to political parties, the theory goes, identify more with individual candidates.[160] As a result, incumbents can garner votes as an individual candidate that otherwise may have been party-line votes against them.[161] This theory receives support from the fact that decreases in party affiliation corresponded with increases in incumbency advantage.[162]

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149. Campaign Finance Institute, *supra* note 128.

150. *Id.*

151. *Id.*

152. *Id.*

153. Press Release, Campaign Finance Institute, House Winners Average $1 Million for the First time: Senate Winners Up 47%, tbl.3: Senate Incumbents and Challengers, Safe and Contested Races 2000-2004 (Nov. 5, 2004), http://www.cfinst.org/pr/110504a.html (follow Table 3 hyperlink).

154. Ansolabehere & Snyder, *supra* note 123, at 315.

155. *Id.*

156. *Id.*

157. James Dao, *Conservative Takes on Moderate G.O.P. Senator in Pennsylvania*, N.Y. TIMES, Apr. 3, 2004, at A8.

158. *Id.*

159. Lauren Sheperd et al., *Specter Could Be Losing Support in Pa.*, THE HILL, May 4, 2004, at 19.

160. Ansolabehere & Snyder, *supra* note 123, at 327.

161. *Id.*

162. *Id.*

Thus, incumbents derive advantages from gerrymandering, fundraising, seniority, and declining party affiliation. These factors relate to the current political structure of the country rather than voter-candidate relations. Consequently, challengers cannot use their reputation in the community to contest these incumbent advantages.

B. Advantages Related to Community Status

Incumbents' status within their constituent community gives them an additional advantage. With earmarks,[163] constituent services, and constant media attention, incumbents increase their status within their community and improve their relations with voters. The Supreme Court called the incumbency advantage stemming from these factors "axiomatic."[164] The Court further elaborated:

> In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government. These include local and Washington offices, staff support, and the franking privilege. Where the incumbent has the support of major special-interest groups . . . and is further supported by the media, . . . contribution and expenditure limitations . . . could foreclose any fair opportunity of a successful challenge.[165]

Incumbents are professional politicians, and FEC rules place no limitations on their ability to exploit the aforementioned advantages of federal office-holding.

Congressmen often earmark federal funds for projects in their districts in order to improve their status with constituents. In the last decade the number of earmark projects increased nearly ten fold, from 1439 in 1995 to 13,997 in 2005.[166] Congress now spends $27.3 billion on earmarks, whereas in 1995 it spent $10 billion.[167] Alaska led the way in earmarks, receiving nearly $1000 per person in federal earmarks in 2005.[168]

Incumbents surely benefit from the local projects for which they secure earmarked federal funds. Even though many consider earmarks a significant

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163. Earmarks are often referred to as pork barrel legislation. Such legislation "favors a particular local district by allocating funds or resources to projects (such as constructing a highway or a post office) of economic value to the district and of political advantage to the district's legislator." BLACK'S LAW DICTIONARY 918 (8th ed. 2004).

164. Buckley v. Valeo, 424 U.S. 1, 31 n.33 (1976).

165. *Id.* The franking privilege is "[t]he privilege of sending certain mail free of charge, accorded to certain government officials, such as members of Congress and federal courts." BLACK'S LAW DICTIONARY 684 (8th ed. 2004).

166. CITIZENS AGAINST GOV'T WASTE, CONGRESSIONAL PIG BOOK 3 (2005), *available at* http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005.

167. *Id.*

168. *Id.*

problem,[169] individual districts and states undoubtedly appreciate the funding they receive. These funds can create infrastructure and jobs for constituents. Additionally, constituents remain fully aware of the earmarks their representatives secure for the district because the local media covers these benefits comprehensively.[170] Thus, earmarks benefit many incumbents when it comes time for re-election.

Incumbents maintain constituent services programs, paid for with tax dollars, whereby they directly communicate with constituents. Congressional rules sanction numerous forms of constituent services.[171] For example, House members are allotted on average over $100,000 for direct mailings to constituents.[172] Also, they can advertise for and conduct town hall meetings and maintain official web sites.[173] Through these programs Congress gives incumbents ample resources to improve their standing with constituents.

Finally, incumbents enjoy a large advantage in overall media attention. Much of this advantage stems from press coverage unrelated to congressional campaigns. The press covers members of the House year-round, documenting their actions as lawmakers in Congress and at home.[174] Incumbents enjoy this non-campaign coverage both in off years and during the campaign season.[175] As a result, House incumbents maintain a huge advantage in total news coverage over challengers.[176] The same advantage could be expected for incumbent Senators because local media rely on their incumbent Senators for news about the federal government.[177]

Campaign coverage depends upon the competitiveness of the race, which also benefits incumbents. In competitive races the media balances coverage of

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169. *See* Shailagh Murray, *Capital's New Four-Letter Word*, WASH. POST, Jan. 27, 2006, at A21. Due to this opposition, Congress may soon reform its practice of rubber-stamping earmarks. Jeffrey H. Birnbaum, *Senate Draft on Lobbying Clamps Down on Earmarks*, WASH. POST, Feb. 28, 2006, at A7.

170. R. DOUGLAS ARNOLD, CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY 146 (2004).

171. COMMITTEE ON HOUSE ADMINISTRATION, MEMBERS' CONGRESSIONAL HANDBOOK, *available at* http://cha.house.gov/services/memberhandbook.htm [hereinafter MEMBERS' CONGRESSIONAL HANDBOOK].

172. COMMITTEE ON HOUSE ADMINISTRATION, WHAT IS THE FRANK?, http://cha.house.gov/services/franking_commission_whatisfrank.htm (last visited Mar. 7, 2006).

173. MEMBERS' CONGRESSIONAL HANDBOOK, *supra* note 171.

174. ARNOLD, *supra* note 170, at 167.

175. *Id.*

176. *Id.* The imbalance in media coverage of campaigns is made possible, at least in part, by the ineffectiveness of the Federal Communications Commission's equal time provisions. *See* Anne Kramer Ricchiuto, Note, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267 (2005).

177. KIM FRIDKIN KAHN & PATRICK J. KENNEY, THE SPECTACLE OF U.S. SENATE CAMPAIGNS 106 (1999).

incumbents and challengers.[178] However, the media gives scant coverage to uncompetitive races, where the challenger's electoral success is less likely.[179] In these uncompetitive races, coverage of incumbents outpaces that of challengers.[180] Because so few races are now competitive, incumbents benefit from the media's hands-off approach to races deemed uncompetitive.[181] The media may contribute to challengers' lack of success in the polls by denying them the attention necessary to improve their electoral prospects.[182]

Media coverage directly relates to electoral success. Increased media coverage helps candidates raise money and prove their viability.[183] In addition, voters' recognition of a candidate's name, familiarity with a candidate, exposure to a candidate, and personal contact with a candidate all typically increase that candidate's probability of success.[184] Therefore, the disproportionate amount of media attention garnered by incumbents further boosts their chances of retaining office.

C. Neutralizing the Incumbency Advantage

While some systemic factors automatically disadvantage challengers, those same challengers could use their status in the community to combat incumbents' status-related advantages. Challengers with strong business reputations could convert that reputation into political capital in federal campaigns. For example, challengers running successful businesses in their communities provide jobs to potential voters. Those challengers can also tout their business success as a qualification for federal office. Therefore a challenger's business experience could operate as his version of earmarks for the community, demonstrating to voters his fitness for office. In addition, challengers regularly engaging in business-related public communications increase their exposure to voters. Those legitimate business communications could indirectly demonstrate a challenger's qualifications for office and increase her name recognition among voters. Those communications could help challengers combat incumbents' advantage relating to media exposure.

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178. *Id.*; ARNOLD, *supra* note 170, at 167.

179. KAHN & KENNEY, *supra* note 177, at 158; ARNOLD, *supra* note 170, at 167.

180. KAHN & KENNEY, *supra* note 177, at 156. Measures of incumbents' actual advantage in news coverage vary. One group, for example, estimates that incumbents receive five times the coverage of challengers. Darlisa Crawford, *Media Coverage of U.S. Elections Closely Monitored*, WASH. FILE (U.S. State Dep't), May 21, 2004, *available at* http://usinfo.state.gov/dhr/Archive/2004/May/21-398977.html.

181. ARNOLD, *supra* note 170, at 156 (arguing that the decision of the media to ignore uncompetitive races "contribute[s] to the safety of incumbents").

182. KAHN & KENNEY, *supra* note 177, at 214.

183. *Id.* at 17.

184. *Id.* at 214, 220.

D. How the Rules Impair Challengers

The rules on coordinated communications impair challengers' ability to convert their status within the community into electoral success. This impairment results from three distinct problems the rules create for some challengers: (1) they harm a candidate's campaign by reducing his status within the community, (2) they harm a candidate's business or professional life by forcing him to curtail his professional obligations and business operations for a chance to run for federal office; and (3) they prevent an aspiring candidate from entering a federal race.

1. Harm to Campaigns.—The rules can directly harm a challenger's campaign by reducing his status within the community in several ways. First, if a challenger chooses to continue engaging in business-related public communications during the campaign, he risks being branded a rule-breaker by opponents. Pete Coors experienced this firsthand when critics labeled the brewery's pre-election ads "inappropriate' and possibly illegal."[185] If opponents believe the communications violate the rules, they may even file a complaint with the FEC. Mike Whalen's restaurant commercials triggered such a complaint.[186] This criticism could significantly reduce a challenger's support among voters.

Second, the rules could create confusion within a challenger's campaign. A challenger aware of the rules could question their applicability to her business-related public communications. Though the rules attempt to create a bright-line test, their application can be fact intensive and thus subject to the FEC's discretion.[187] Such a distraction could impair a challenger's ability to effectively campaign.

Third, if a challenger chooses to cease engaging in business-related public communications, his exposure to voters would decrease. In order to avoid breaking the rules, a challenger may choose to shelve his business-related public communications during the campaign. That would automatically reduce his exposure to voters, decreasing his likelihood of electoral success.

2. Harm to Businesses.—The rules could harm a challenger's business or professional life by forcing her to curtail her business or professional obligations during the campaign. First, the rules create uncertainty for businesses disseminating the communications. Russ Darrow's auto dealership group feared its advertisements could bring "the threat of criminal penalties for an unlawful in-kind corporate contribution to a political campaign."[188]

That confusion could force businesses to limit their communications, with potentially devastating effects. Darrow's dealerships typically spent half a million dollars per month on advertising, and elimination of that advertising for four months before November elections could harm both the dealerships and the

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185. Brand & Kesmodel, *supra* note 67.

186. Earnhardt Letter, *supra* note 84.

187. *See supra* note 59 and accompanying text.

188. Will, *supra* note 1.

salesmen who rely on commissions from sales.[189] The rules led Andy Mayberry to sell one of his publications to his financial detriment and to reduce activities in another.[190] Clearly the rules can inflict significant harm on candidates' businesses.

3. Reductions in the Candidate Pool.—The rules could even dissuade potential challengers from entering the race. A potential challenger aware of the harm the rules could inflict on her campaign and business, and the benefit that harm confers on the incumbent, may forgo a shot at federal office. Even a potential challenger willing to accept the business-related harm could still be dissuaded from running because the campaign-related harm could decrease his overall chances of electoral success. The harm inflicted by the rules can raise the cost of running for office, and this higher cost of running "dissuades potentially higher quality challengers from seeking office and allows lower quality incumbents to persist."[191]

VIII. THE SOLUTION

The coordinated communications rules could close a campaign finance loophole while sparing legitimate business communications from undue regulation. However, the FEC cannot prevent the rules' capture of business communications without directly addressing the problem that results. Thus, the FEC must tailor the rules to ensure these business communications are excluded without creating excessive uncertainty for candidates. Challengers should be able to examine the rules and be assured that their legitimate business communications will not be barred or limited by the FEC.

First, the excluded business communications must be legitimate and not attempts to circumvent campaign finance limitations. Candidates should not be allowed to use business communications as de facto campaign advertisements. Any direct support for the person's federal candidacy or opposition to opponent candidates should eliminate business legitimacy. In judging business legitimacy, the FEC should consider whether the candidate used similar business communications before he entered the race.

Still, business legitimacy is a broad concept, and it should retain that breadth in the safe harbor. The FEC should not substitute its business judgment for that of the business in question. Changes in the form or number of business communications should not automatically strip the communications of their business legitimacy. Legitimate business considerations could prompt such changes.[192] Nor should the candidate's campaign message affect the legitimacy

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189. *Id.*

190. Mayberry E-mail, *supra* note 78.

191. Einer Elhauge et al., *How Term Limits Enhance the Expression of Democratic Preferences*, 5 SUP. CT. ECON. REV. 59, 68 (1997).

192. For example, the Coors brewery created ads outside of its regular ad campaign in response to ads attacking the company. Brand & Kesmodel, *supra* note 67. Ads such as those should be considered legitimate.

of his business communications. A challenger should be able to tout his business experience as a campaign theme. Business communications should not be rendered illegitimate merely because they reinforce or remind voters of the candidate's campaign themes.

Second, the rules should avoid creating undue uncertainty for candidates. Uncertainty is a problem because it prevents candidates and businesses from making decisions with full knowledge of the likely consequences. Uncertainty could lead cautious challengers to curtail their business communications or risk-taking challengers to continue business communications that ultimately are found to violate the rules. Such uncertainty also opens the door for opponents to label each other rule-breakers, even if the FEC ultimately vindicates the accused.

Therefore, the rules should retain the bright line tests currently found in the content prong, but they should include a safe harbor for legitimate business communications. That safe harbor provision could read as follows:

> Safe harbor for legitimate business communications. The content standards are not met if: (1) the public communication is paid for by a business associated with a federal candidate; (2) the public communication is made for legitimate business purposes; and (3) the public communication does not promote, support, attack, or oppose the federal candidate associated with the business, that candidate's opponent, or another candidate who seeks election to the same office as that candidate.[193]

The language above is meant only to illustrate a general solution. Other language could accomplish the same result—ensuring candidates that their legitimate business communications remain free from FEC regulation.

This approach would retain the structure of the rules and the bright-line tests to which federal candidates have grown accustomed, but the safe harbor would save legitimate business communications from undue regulation. Admittedly, some ambiguity would persist—for example, regarding whether the communication was made for legitimate business purposes. Still, common sense considerations could guide this determination. The FEC could consider whether the business has a history of using similar public communications and whether similar businesses in the industry use similar public communications. However, those factors should not narrow the scope of business legitimacy. In the end, the safe harbor should protect nearly all business communications that do "not promote, support, attack, or oppose" a relevant federal candidate.[194]

This safe harbor solves the problem of over-inclusion by shielding legitimate business communications from unnecessary regulation by the FEC. The safe harbor would protect regular business advertisements as well as most communications by candidates employed in the media industry. With this safe harbor, Pete Coors, Russ Darrow, and Mike Whalen could have campaigned

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193. The language and structure of this proposal mirrors that of two safe harbor provisions adopted by the FEC in the post-*Shays* rulemaking. Proposed Rules, *supra* note 108, at 8.

194. *Id.*

without the fear that their beer, automobile, and restaurant advertisements were breaking the FEC's rules. Andy Mayberry could still own his newspaper and could have continued penning columns therein. This rule change would allow challengers to compete more effectively with congressional incumbents. Such a change would be a small step towards greater fairness for challengers and a healthier democracy in America.

CONCLUSION

The BCRA expanded the rules on coordinated communications to the point where they now proscribe legitimate business communications unrelated to federal elections. These business communications comprise yet another form of speech "made problematic by the campaign reformers' itch to extend government supervision of speech."[195] One problematic aspect of the coordinated communications rules is the electoral advantage they give incumbents. Opportunities abound for incumbents to increase their community status. The rules prohibit challengers from doing the same by outlawing many of their legitimate business communications. The rules should be rewritten to ensure that they leave the legitimate business communications of federal candidates untouched. The FEC's coordinated communications rules should include a safe harbor for legitimate business communications to promote fairness for political outsiders in federal elections.

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195. Will, *supra* note 1.

THREE STRIKES YOU'RE OUT: THE EFFECT AND CONTROVERSIES OF THE SEC'S ATTEMPTED MANDATE FOR GREATER INDEPENDENCE ON MUTUAL FUND BOARDS

STEPHANIE THIELEN ECKERLE*

INTRODUCTION

Mutual funds have become the investment of choice for individual investors.[1] They allow investors to build a diverse portfolio at a reasonable price.[2] In America alone, over ninety million people, which equates to half of all households, invest in mutual funds.[3] In 2004, despite the recent multitude of investment company scandals,[4] mutual fund investments reached a record high with $7.6 trillion invested,[5] including twenty-one percent of the $10.2 trillion retirement market.[6] In 2005, mutual fund assets continued to grow and reached a record $8.8 trillion in November.[7]

Despite the rapid and continued growth of mutual funds,[8] the Securities and

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1. Harvey J. Goldschmid, Comm'r, Sec. and Exch. Comm'n, Mutual Fund Regulation: A Time for Healing and Reform, Speech Before the Investment Company Institute 2003 Securities Law Developments Conference (Dec. 4, 2003), 2003 WL 23177225, at *1.

2. Roberta S. Karmel, *Mutual Funds, Pension Funds, Hedge Funds and Stock Market Volatility—What Regulation by the Securities and Exchange Commission Act Is Appropriate?*, 80 NOTRE DAME L. REV. 909, 914 (2005) [hereinafter Karmel, *Mutual Funds*].

3. Mercer E. Bullard, *The Mutual Fund Summit: Context and Commentary*, 73 MISS. L.J. 1129, 1130 (2004).

4. *See* SEC. AND EXCH. COMM'N, EXEMPTIVE RULE AMENDMENTS OF 2004: INDEPENDENT CHAIR CONDITION, A REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, 2005 SEC Lexis 1031, at *3 (2005) [hereinafter REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT]. Since 2003, the SEC has acquired over $2.2 billion in disgorgements and civil penalties from enforcement actions brought against investment companies. *Id.* This money is being used to compensate shareholders adversely affected by the mutual fund scandals. *Id.*; *see* Investment Company Governance, 70 Fed. Reg. 39,390, 39,399 (Sec. and Exch. Comm'n July 7, 2005) (Donaldson, concurring) (to be codified at 17 C.F.R. pt. 270) (response to remand).

5. Bullard, *supra* note 3, at 1130.

6. Goldschmid, *supra* note 1, at *1.

7. *Trends in Mutual Fund Investing, November 2005*, INV. CO. INST. (Dec. 29, 2005), http://www.ici.org/stats/mf/arctrends/trends_11_05.html.

8. *See generally* BRIAN REID ET AL., INV. CO. INST., 2005 INVESTMENT COMPANY FACT BOOK (45th ed. 2005), *available at* http://www.ici.org/pdf/2005_factbook.pdf. In 2004, the average household invested 19.5% of its household financial assets in mutual funds compared to only 6.8% of household financial assets invested in 1990. *Id.* at 12. Furthermore, the number of investment companies holding mutual funds has increased from 5725 in 1995 to 8044 in 2004, and the total assets of those investment companies has increased from $2,811 billion in 1995 to $8,107 billion

Exchange Commission (the "SEC") took aggressive action in 2004 to address perceived failures within the corporate structure of investment companies by promulgating new regulations (the "New Rules") under the Investment Company Act of 1940 (the "ICA").[9] The New Rules, which were originally to take effect in January 2006, require a mutual fund's board of directors to be composed of seventy-five percent independent directors, including the chair, as opposed to only a majority of independent directors.[10] Although the perceived failures in the mutual fund industry are based on recent SEC enforcement actions addressing the late trading of mutual fund shares, illegitimate market timing, and the exploitation of undisclosed details about fund portfolios,[11] the New Rules may not have prevented such abuses and do not address many of the recent mutual fund scandals.[12] The SEC, however, believes that the New Rules are a proactive and essential measure to protect shareholders by strengthening the independence of fund boards, thereby reducing inherent conflicts of interest and forcing the fund's management to abide by all compliance standards.[13] In addition, the New Rules are an attempt to restore a perceived lack of integrity, trust, and fairness in the mutual fund industry.[14] The SEC's motivation in passing the New Rules, however, appears to be not only slightly politicized,[15] but also seems to overlook the significant cost that the New Rules will likely impose on investors.[16]

The core of the SEC's New Rules focuses on two extremely controversial provisions that have sparked a firestorm of comments and criticism. Pending the outcome of the New Rules, all investment companies that transact under the Exemptive Rules of the ICA must alter their board of directors to be seventy-five

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in 2004. *Id.* at 3, 9.

9. Investment Company Governance, 69 Fed. Reg. 46,378, 46,378-79 (Sec. and Exch. Comm'n Aug. 2, 2004) (to be codified at 17 C.F.R. pt. 270) (final rule).

10. *Id.*

11. *Id.*

12. *Id.*; Chamber of Commerce v. Sec. and Exch. Comm'n (*Chamber I*), 412 F.3d 133, 141 (D.C. Cir. 2005); *see* Karmel, *Mutual Funds*, *supra* note 2, at 934 (explaining that many of the enforcement actions the SEC has brought against mutual funds have involved hedge funds, which are not regulated by the ICA and thus are not subject to the New Rules).

13. Investment Company Governance, 69 Fed. Reg. at 46,379 (final rule).

14. Goldschmid, *supra* note 1, at *2. Recent studies, however, indicate that investor confidence in the mutual fund industry has risen over the past two years after a decline in 2000 through 2003. *Fundamentals, Investment Company Institute Research in Brief, Shareholder Sentiment About the Mutual Fund Industry, 2005*, 14 INV. CO. INST. 7 (2005), *available at* www.ici.org/stats/res/index.hml (follow "More Issues of Fundamentals" hyperlink; then follow "Shareholder Sentiment About the Mutual Fund Industry, 2005 (pdf) December 2005" hyperlink).

15. Roberta S. Karmel, *Key Outcomes of* "Chamber of Commerce v. SEC," N.Y. L.J., Aug. 18, 2005, at Col. 1, *1 [hereinafter Karmel, *Key Outcomes*]; *see* Jonathan R. Macey, *State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 136-37 (2004).

16. *See* Investment Company Governance, 69 Fed. Reg. at 46,390 (final rule) (Glassman and Atkins, dissenting).

percent independent,[17] as well as elect or nominate an independent chair to the board of directors.[18] Not only did the SEC receive over 200 comments from investors, management companies, directors of mutual funds, and members of Congress,[19] but the New Rules only passed the Commission by a 3-2 vote with Commissioners Cynthia A. Glassman and Paul S. Atkins dissenting.[20] The numerous comments and strong dissent foreshadowed the intensive scrutiny and debate that was to follow, which culminated in a lawsuit brought against the SEC by the Chamber of Commerce.[21] This lawsuit and the subsequent actions of the SEC resulted in the Court of Appeals for the District of Columbia ("D.C. Circuit") remanding the New Rules back to the SEC on two separate occasions.[22]

Part I of this Note sets forth the general corporate structure of mutual funds

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17. An independent director is a director that is non-interested, meaning that he is not affiliated with the investment company, is not an immediate family member of anyone in the investment company, is not affiliated with the investment adviser or principal underwriter, and has not acted as legal counsel for the investment company within the preceding two years. 15 U.S.C. § 80a-2(a)(3) (2000). A person is affiliated with an investment company if he owns over five percent or more of the outstanding voting securities. *Id.*

18. Investment Company Governance, 69 Fed. Reg. at 46,381-82 (final rule); *see generally* Thomas R. Hurst, *The Unfinished Business of Mutual Fund Reform*, 26 PACE L. REV. 133, 143-45, 152 (2005) (summarizing the SEC's New Rules, the controversy surrounding the New Rules, and the possible effects of the New Rules on investor protection); David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV. 39 (2005) (explaining the SEC's analysis of capital formation in passing the seventy-five percent independent board and chair requirements and past efforts of the SEC to analyze the effect that its rules and programs have on capital formation).

19. Investment Company Governance, 69 Fed. Reg. at 46,379 (final rule). Both Congressman Mike Oxley and Senator Paul Sarbanes, authors of the Sarbanes-Oxley Act, support the New Rules due to the added protection afforded to investors. Investment Company Governance, 70 Fed. Reg. 39,390, 39,401 (Sec. and Exch. Comm'n July 7, 2005) (Campos, concurring) (to be codified at 17 C.F.R. pt. 270) (response to remand).

20. Investment Company Governance, 69 Fed. Reg. at 46,390-93 (final rule).

21. *See Chamber I*, 412 F.3d 133 (D.C. Cir. 2005). Any party adversely affected by an SEC rule promulgated under certain sections of the ICA may file suit against the SEC. *See* 15 U.S.C. § 78y(b) (2000); THOMAS LEE HAZEN, 5 LAW OF SECURITIES REGULATION § 16.22 (5th ed. 2000). The Chamber of Commerce is an adversely affected party and has standing to sue because the New Rules will prevent members of the Chamber of Commerce from investing in mutual funds that do not have an independent chair or seventy-five percent independent directors, and thus suffer an "injury-in-fact." *Chamber I*, 412 F.3d at 138. In addition, the historical data showing that management-chaired funds perform slightly better than funds with independent chairs and that the New Rules could prevent small funds from entering the mutual fund market also support the Chamber of Commerce's standing. Chamber of Commerce v. Sec. and Exch. Comm'n (*Chamber II*), 443 F.3d 890, 896-97 (D.C. Cir. 2006).

22. After the D.C. Circuit originally remanded the New Rules in *Chamber I*, the SEC quickly readopted the New Rules. In *Chamber II*, the D.C. Circuit again remanded the New Rules back to the SEC. 443 F.3d at 909.

and the legislative history of mutual fund regulation. This part focuses not only on the relationship between investment companies and their management, but also the inherent conflicts of interest between mutual fund managers and shareholders.

Part II explains the New Rules as originally proposed by the SEC, specifically the seventy-five percent independent board and chair requirements. This section then analyzes the D.C. Circuit's interpretation of the SEC's controversial provisions under the ICA and the Administrative Procedure Act (the "APA") in the case of *Chamber I*, and the SEC's re-adoption of the New Rules only eight days after the D.C. Circuit remanded the provisions back to the SEC. In addition, Part II examines the reaction of both the Chamber of Commerce and the public to the SEC's swift re-adoption of the New Rules and the D.C. Circuit's second remand of the New Rules in *Chamber II*.

Part III analyzes why the New Rules do not optimally achieve the goals of the SEC and examines the effectiveness of the SEC's prior rules that are aimed at protecting investors, including the 2001 amendment to the ICA requiring a majority of independent directors. This section also includes an analysis of the impact that the New Rules would have had on the recent mutual fund scandals, the lack of empirical evidence upon which the SEC based the new rules, and the disclosure alternative. In conclusion, this Note examines the adverse short-term and long-term implications that the holdings in *Chamber I* and *Chamber II* will have on the New Rules and future rule-making procedures of the SEC.

I. THE CORPORATE STRUCTURE AND LEGISLATIVE HISTORY OF MUTUAL FUNDS

A. Corporate Structure of Investment Companies

Conflicts of interest are inherent in mutual funds;[23] therefore, it is vital to understand the corporate structure that causes these problems. A mutual fund is a collection of assets consisting mainly of various and diverse securities owned by individual shareholders that have invested in shares of the mutual fund.[24] Mutual funds are controlled, managed, and formed[25] by investment companies, such as Fidelity Investments ("Fidelity"). These investment companies invest, reinvest, or trade in securities on behalf of the shareholders,[26] and the investments by the shareholders supply the money needed by the investment company to continue investing in the diverse securities.[27] The investment

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23. *See* Karmel, *Mutual Funds*, *supra* note 2, at 914.

24. Burks v. Lasker, 441 U.S. 471, 480 (1979); *Chamber I*, 412 F.3d at 136.

25. *Burks*, 441 U.S. at 481.

26. *See* 15 U.S.C. § 80a-3 (2000); *see also* David J. Oliveiri, Annotation, *What Is an "Investment Company" Under § 3 of Investment Company Act of 1940 (15 U.S.C.A. § 80a-3)*, 64 A.L.R. FED. 337 (1983).

27. INV. CO. INST., A GUIDE TO UNDERSTANDING MUTUAL FUNDS 6 (2004), http://www.ici.org/pdf/bro_understanding_mfs_p.pdf.

company usually has separate underwriters and no employees.[28] In addition, each mutual fund within an investment company has specific goals and is managed by an external entity, called an investment adviser.[29] The investment adviser, pursuant to a contract with the investment company, chooses or recommends all of the mutual fund's investments[30] and provides administrative and management services.[31]

Investment advisers have other goals beyond increasing the shareholder's return, which is where the inherent conflict of interest arises.[32] Because the management company and investment advisers are external from the investment company, the investment adviser's loyalty and monetary gain are outside the fund; thus, their interest in their own profits may be adverse to the interest of the mutual fund and the shareholders.[33] An investment adviser typically profits by receiving a fee based upon a percentage of assets in the mutual fund that is under his management.[34] Consequently, investment advisers are concerned with increasing and maximizing the assets in the mutual funds that they advise, thus increasing their compensation.[35] Shareholders, however, are concerned with

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28. Karmel, *Mutual Funds*, *supra* note 2, at 914.

29. *Burks*, 441 U.S. at 481.

30. 15 U.S.C. § 80a-2 (2000).

31. *Burks*, 441 U.S. at 481 (quoting S. REP. NO. 91-184, at 5 (1969)). For example, Fidelity, an investment company, has over three hundred Fidelity mutual funds, and thousands of non-Fidelity funds, that investors can choose from when investing. Fidelity Research and Management Company ("FMR Co.") manages all of Fidelity's mutual funds. FIDELITY, INSIDE FIDELITY, http://personal.fidelity.com/myfidelity/InsideFidelity/index.html (follow "Company Overview" hyperlink; then follow "Investment Management" hyperlink) (last visited Sept. 18, 2006). FMR Company employs over five hundred investment specialists, including both investment advisers and analysts, that research investment strategies and new investment opportunities. *Id.* For example, Fergus Shiel, an employee of FMR Company and an investment adviser, manages Fidelity's Capital Appreciation Fund, one of Fidelity's top performing mutual funds. The investment advisers often manage more than one mutual fund. FIDELITY, FIDELITY CAPITAL APPRECIATION FUND, http://personal.fidelity.com/products/funds/mfl_frame.shtml?316066109 (last visited Sept. 18, 2006). The Capital Appreciation Fund has the goal of obtaining capital appreciation by investing in securities, which consist of mainly foreign and domestic stock. *Id.* Fergus Shiel and his staff choose the stocks for the mutual fund by analyzing the stock's financial state, industry position, and other market and economic forces. *Id.*

32. *Chamber I*, 412 F.3d 133, 136 (D.C. Cir. 2005). For example, a conflict of interest arises when the investment adviser encourages private investors to deposit new assets into the fund in exchange for abusive market timing privileges. REPORT IN ACCORDANCE WITH THE CONSOLIDATED ACT, *supra* note 4, at *11, 73.

33. Investment Company Governance, 70 Fed. Reg. 39,390, 39,396 (Sec. and Exch. Comm'n July 7, 2005) (to be codified at 17 C.F.R. pt. 270) (response to remand); 15 U.S.C. § 80a-17 (2000).

34. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *11.

35. *Id.*

having a profitable mutual fund, as opposed to a large mutual fund.[36] This inherent conflict of interest has led numerous investment advisers to encourage private investors to deposit large sums of money into a mutual fund, thus increasing the mutual funds' assets and the investment adviser's compensation.[37] The investment adviser then gives the private investor illegal or abusive privileges, such as market timing privileges, which harms other shareholders.[38]

Section 17 of the ICA addresses and forbids certain "self-dealing transactions" in order to reduce the inherent conflict of interest that arises between shareholders and mutual fund investment advisers.[39] The ICA, however, does not address all conflicts of interest that can arise, such as "the allocation of brokerage commissions, the use of fund assets for distribution, the allocation of expenses between a fund and its adviser and among funds, responsibility for any pricing errors or violations of investment restrictions, and personal investing by officers and employees of the fund's adviser."[40] Therefore, in order to assure that the mutual fund's investment adviser is acting in the best interest of the shareholder, a board of directors elected by the shareholders governs the mutual fund.[41] The ICA and various SEC regulations, orders, and interpretations stringently govern fund directors, whether independent or affiliated with the management company.[42]

The board of directors has the responsibility of, among other things, valuing the securities held by the fund, approving the fund's investment advisory and principal underwriter contracts, approving distribution plans under Rule 12b-1 of the ICA,[43] and generally overseeing any transaction that the Exemptive Rules govern.[44] The board of director's main goal, however, is to ensure that the fund's

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36. Shareholders would only be concerned with increasing the assets of the mutual fund "to the extent that the increase [in assets] achieves the economies of scale that should reasonably accompany fund growth." *Id.*

37. *Id.*

38. *Id.*

39. INVESTMENT COMPANY INSTITUTE, REPORT OF THE ADVISORY GROUP ON BEST PRACTICES FOR FUND DIRECTORS, ENHANCING A CULTURE OF INDEPENDENCE AND EFFECTIVENESS 8 (1999), *available at* http://www.ici.org (follow "Key Issues" hyperlink; then follow "Directors & Fund Governance" hyperlink; then follow "Report of the Advisory Group on Best Practices for Fund Directors (pdf) June 1999" hyperlink) [hereinafter INVESTMENT COMPANY INSTITUTE, FUND DIRECTORS].

40. *Id.* at 9.

41. *Chamber I*, 412 F.3d 133, 136 (D.C. Cir. 2005).

42. INVESTMENT COMPANY INSTITUTE, FUND DIRECTORS, *supra* note 39, at 6; REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *12, 14-15.

43. The board of directors should closely monitor the 12b-1 distribution plans because an investment adviser can charge higher 12b-1 fees in order to maximize fund assets, and thus increase the fee paid to the adviser. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *12, *14-15; INVESTMENT COMPANY INSTITUTE, FUND DIRECTORS, *supra* note 39, at 6-7.

44. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4,

investment adviser is acting in the best interest of the shareholders, and that the shareholders are obtaining the benefits and services they are entitled to under the ICA and the fund's prospectus and disclosure documents.[45]

B. History of Mutual Fund Regulation

The main goal of Congress in passing the ICA was to diminish the inherent conflicts of interest between investment advisers and shareholders.[46] The key provision of the ICA requires a mutual fund's board of directors to be composed of at least forty percent independent directors to serve as "watchdogs" by independently checking and monitoring the mutual fund's management.[47] This independent check works to ensure that the investment advisers are not engaging in transactions for their own self-interest at the detriment of the shareholder.[48] In addition, under the ICA both investment advisers[49] and mutual fund directors owe the fiduciary duties of care, good faith, and loyalty to the shareholders.[50] If an investment adviser or director violates a fiduciary duty, the SEC can bring an action against him resulting in, among other things, permanent or temporary enjoinment of his position within the investment company.[51]

The ICA allows mutual funds to engage in prohibited transactions if the fund adheres to the specific Exemptive Rules set forth in the ICA.[52] Adherence to these rules allows mutual funds to transact with affiliated companies, which is necessary for most mutual funds to conduct business.[53] Because the vast majority of mutual funds must adhere to these rules to thrive,[54] the SEC is able to impose new regulations on virtually all funds by incorporating the regulations into the

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at *129.

45. INVESTMENT COMPANY INSTITUTE, FUND DIRECTORS, *supra* note 39, at 6-7.

46. *See* Burks v. Lasker, 441 U.S. 471, 480-81 (1979); *Chamber I*, 412 F.3d at 136-37; INVESTMENT COMPANY INSTITUTE, FUND DIRECTORS, *supra* note 39, at 6.

47. *Burks*, 411 U.S. at 482, 484. The reference to the independent directors as "watchdogs" by the Supreme Court has been quoted in numerous authorities, many of which are cited in this Note.

48. *Chamber I*, 412 F.3d at 136.

49. *See* 15 U.S.C. § 80b-6 (2000).

50. Goldschmid, *supra* note 1, at *5; *see* Diane E. Ambler, *Roundtable on the Role of Independent Investment Company Directors: Issues for Independent Directors of Bank-Related Funds, Variable Insurance Product Funds, and Closed-End Funds*, 55 BUS. LAW. 205, 210-11 (1999); *see also* Bullard, *supra* note 3, at 1141.

51. 15 U.S.C. § 80a-35 (2000).

52. *Chamber I*, 412 F.3d at 136. Under the ICA, the SEC has the power to exempt any person, security, or transaction from the rules and regulations of the ICA if the exemption is in the best interest of the public and protects investors. 15 U.S.C. § 80a-6(c) (2000); REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *19.

53. Karmel, *Mutual Funds*, *supra* note 2, at 916.

54. *See* Initial Opening Brief of Petitioner at 9, Chamber of Commerce v. Sec. and Exch. Comm'n, 412 F.3d 133 (D.C. Cir. 2005) (No. 04-1300).

Exemptive Rules.[55]

C. Recent Amendments to the Investment Company Act

In 2001, the SEC amended the ICA by requiring investment companies to have a majority of independent directors on the board, as opposed to only forty percent.[56] The independent directors have the responsibility of, among other things, selecting and nominating new independent directors and hiring attorneys with no connections to the mutual fund's management.[57] While the SEC was passing this amendment, it was simultaneously trying to pass new regulations requiring more independence on corporate boards under the Sarbanes-Oxley Act.[58]

More recently, the SEC has required mutual funds to hire a chief compliance officer ("CCO").[59] The CCO is required to meet with only the independent directors, as opposed to the entire board and submit a report on compliance issues to the full board.[60] Likewise, a mutual fund's attorneys are now required to report any compliance or fiduciary breaches to the independent directors and the CCO.[61] This not only gives the independent directors greater control over the investment advisers, including the ability to solve conflicts of interest and compliance breaches, but also enables the open flow of information.[62]

II. THE SEC'S NEW RULES REQUIRING AN INDEPENDENT CHAIR AND SEVENTY-FIVE PERCENT INDEPENDENCE ON THE BOARD OF DIRECTORS

A. The New Rules as Originally Proposed

The SEC's New Rules require a mutual fund's board of directors to be comprised of at least seventy-five percent independent directors, including an independent chair of the board.[63] The three commissioners that voted in favor of

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55. Investment Company Governance, 69 Fed. Reg. 46,378, 46,390 n.1 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270) (final rule).

56. Investment Company Governance, 69 Fed. Reg. at 46,378 (final rule); Karmel, *Mutual Funds*, *supra* note 2, at 930.

57. Investment Company Governance, 69 Fed. Reg. at 46,378 n.2 (final rule); Karmel, *Mutual Funds*, *supra* note 2, at 931.

58. Karmel, *Mutual Funds*, *supra* note 2, at 930; *see* Hurst, *supra* note 18, at 144, 152.

59. Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74,714, 74,721 (Sec. and Exch. Comm'n Dec. 24, 2003) (to be codified at 17 C.F.R. pts. 270, 275, 279); Goldschmid, *supra* note 1, at *4.

60. Compliance Program of Investment Companies and Investment Advisers, 68 Fed. Reg. at 74,721; *see* Goldschmid, *supra* note 1, at *4; *see* Karmel, *Mutual Funds*, *supra* note 2, at 932.

61. Goldschmid, *supra* note 1, at *4.

62. *See id.*

63. Investment Company Governance, 69 Fed. Reg. 46,378, 46,381-82 (Sec. and Exch. Comm'n Aug. 2, 2004) (to be codified at 17 C.F.R. pt. 270) (final rule). If, however, the board of

the New Rules, Chairman Donaldson, Commissioner Goldschmid, and Commissioner Campos (collectively the "Majority Commissioners"), believe that the amendments will enable the independent directors to take and preserve control over the board, and thus better fulfill their fiduciary duties and address conflicts of interest by monitoring the investment advisers.[64] If the independent directors do not have control over the board nor access to vital information regarding the mutual fund, the directors affiliated with the management company would be in a position to control the agenda of the board[65] and possibly allow or overlook conflicts of interest.

The SEC's independent chair requirement is considered the "capstone" of the 2004 mutual fund reforms.[66] The Majority Commissioners believe that an independent chair can effectively protect the shareholders due to the absence of any conflicts of interest,[67] unlike a chair that also is an executive of the management company.[68] The independent chair can enable an open and beneficial dialogue between the affiliated and independent directors during board meetings and provide another independent check on the fund management; therefore, protecting the long-term interest of the shareholders.[69]

Under the ICA, the SEC has a statutory obligation to ascertain the economic implications of the New Rules, including the effect the New Rules would have on efficiency, competition, and capital formation.[70] In the first proposal of the New Rules, the SEC included a cost-benefit analysis.[71] When analyzing the cost of the seventy-five percent independence requirement, the SEC merely listed the three different ways in which a board could comply with the New Rules.[72] The SEC then stated, "our staff has no reliable basis for determining how funds would choose to satisfy this requirement and therefore it is difficult to determine the costs associated with electing independent directors."[73] Likewise, in requiring an independent chair, the SEC stated, "our staff is not aware of any out-of-pocket costs that would result . . . because these requirements could be satisfied at a

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directors has only three members, two of those three must be independent. *Id.* at 46,386.

64. *Id.* at 46,382.

65. *Id.*

66. Investment Company Governance, 70 Fed. Reg. 39,390, 39,399 (Sec. and Exch. Comm'n July 7, 2005) (Donaldson, concurring) (to be codified at 17 C.F.R. pt. 270) (response to remand).

67. Investment Company Governance, 69 Fed. Reg. at 46,382 (final rule).

68. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *133; *see also* Investment Company Governance, 70 Fed. Reg. at 39,399 (Donaldson, concurring) (response to remand).

69. Investment Company Governance, 70 Fed. Reg. at 39,399 (Donaldson, concurring) (response to remand).

70. *Chamber I*, 412 F.3d 133, 142-44 (D.C. Cir. 2005); 15 U.S.C. § 80a-2(c) (2000); *see* Ruder, *supra* note 18, at *passim*.

71. Investment Company Governance, 69 Fed. Reg. at 46,385-87 (final rule).

72. *Id.* at 46,387.

73. *Id.* at 46,387; *Chamber II*, 443 F.3d 890, 894 (D.C. Cir. 2006).

regularly scheduled board meeting."[74]

The SEC, in the first proposal, stated that the New Rules would have no "significant effect" on efficiency, competition, and capital formation because of the perceived minimal economic impact.[75] The Majority Commissioners believe the only impact that the New Rules might have on competition and capital formation is an increase in investor confidence due to the prevention of potential securities fraud, such as late trading and market timing.[76]

B. Chamber I

At issue in the Chamber of Commerce's initial lawsuit were the two controversial provisions.[77] The Chamber of Commerce claimed that by adopting the New Rules, the SEC went beyond its scope of authority under the ICA and abused its rulemaking power under the APA.[78] The D.C. Circuit held that the SEC had the authority to adopt the provisions under the ICA;[79] however, the SEC violated the APA by failing to consider the cost imposed upon shareholders'[80] and failing to consider the disclosure alternative proposed by the dissenting commissioners.[81] The SEC was not required to base its decision on empirical data, including a study conducted by Fidelity, but did have an obligation to estimate the cost to individual mutual funds.[82] Thus, the D.C. Circuit remanded the New Rules back to the SEC for compliance with the ruling.[83] In addition, the SEC also had to justify the New Rules by providing a comprehensive report to the Senate Appropriations Committee.[84]

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74. Investment Company Governance, 69 Fed. Reg. at 46,387 (final rule).

75. *See id.* at 46,388.

76. *Id.* at 46,388-89. Former SEC Commissioner Roberta Karmel, has described late trading as "permitting a purchase or redemption order received after the 4:00 p.m. pricing of a mutual fund's net asset value[,]" and market timing as "the frequent buying and selling of mutual fund shares to take advantage of price disparities between a mutual fund's portfolio securities and the reflection of that change in the fund's share price." Karmel, *Mutual Funds, supra* note 2, at 929-30. Although market timing is not illegal, it can harm shareholders by reducing the value of their shares. *In re* Federated Inv. Mgmt. Co., Federated Sec. Corp. and Federated S'holder Serv. Co., Investment Advisers Act of 1940 Release No. 2448, Investment Company Act of 1940 Release No. 27,167, at *7-8 (Nov. 28, 2005).

77. *Chamber I*, 412 F.3d 133, 136 (D.C. Cir. 2005); Hurst, *supra* note 18, at 143-44.

78. Hurst, *supra* note 18, at 138; *see also* Ruder, *supra* note 18, at 47.

79. *Chamber I*, 412 F.3d at 141; *see also* Ruder, *supra* note 18, at 47.

80. *Chamber I*, 412 F.3d. at 144; Hurst, *supra* note 18, at 143.

81. *Chamber I*, 412 F.3d at 144-45; *see also* Ruder, *supra* note 18, at 49.

82. *Chamber I*, 412 F.3d at 142-44; *see also* Ruder, *supra* note 18, at 48-50 (noting that the D.C. Circuit's holding that the SEC did not need empirical data to base the New Rules was crucial because had the court held otherwise, "the effect would be to deny [the SEC] power to make rules in the absence of available data").

83. *Chamber I*, 412 F.3d at 145.

84. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2910

C. *Actions of the SEC After* Chamber I

The SEC typically takes months to respond to a court's ruling; however, the New Rules were re-adopted by the SEC only eight days after *Chamber I* and only one day prior to Chairman Donaldson's planned retirement.[85] Chairman Donaldson believed that the quick re-adoption was not rushed, but rather it protected investors, enhanced investor confidence, and precluded the New Rules from being left in a state of limbo.[86] In addition, the SEC has a reputation for meeting deadlines and in the past has acted with expediency on matters that it believes to be of the utmost importance.[87] Commissioner Glassman, however, stated that the sudden re-adoption was a "rush to judgment" and based on "an assembly of false statements, unsupported assumptions, flawed analysis, and misinterpretations."[88]

The SEC believed that the threshold question from *Chamber I* was whether it was essential to conduct additional fact finding and further notice and comment on the New Rules.[89] The SEC mistakenly concluded that no further public comment was necessary since it had received comments relating to both the cost and disclosure alternative and instead relied on the original record.[90] The SEC also relied on publicly available information.[91] The publicly available information to which the SEC referred included a widely used "industry survey" to estimate the cost of compliance for the independent chair requirement.[92]

Commissioner Glassman and Atkins's strongly worded dissents to the SEC's re-adoption after *Chamber I* highlight both the perceived procedural and

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(2004).

85. Monica Gagnier, *Donaldson's Parting Shot*, BUS. WK., July 4, 2005, at 44; *see* Investment Company Governance, 70 Fed. Reg. 39,390, 39,391 (Sec. and Exch. Comm'n July 7, 2005) (to be codified at 17 C.F.R. pt. 270) (response to remand). Critics viewed the SEC's re-adoption of the New Rules one day prior to Chairman Donaldson's planned retirement as a political maneuver. The Majority Commissioners, however, stated that this rushed re-adoption was necessary because of the familiarity the SEC commissioners had with the New Rules due to the year and a half they had spent studying and researching them. *Id.*

86. Investment Company Governance, 70 Fed. Reg. at *passim* (response to remand).

87. *Id.* at 39,402-03 (Campos, concurring). For example, ten days prior to Chairman Pitt's retirement in 2003, the SEC enacted ten rules, several of them being final rules or comments. *Id.* Moreover, in 2003, due to the Sarbanes-Oxley Act, the SEC conducted more rulemaking in one year than they had done in any other decade. *Id.*

88. Robert Schmidt, *SEC Resuscitates its Mutual Fund Governance Rule Move Rushed by Donaldson, Critics Claim*, GLOBE AND MAIL, June 30, 2005, at B15.

89. Investment Company Governance, 70 Fed. Reg. at 39,390 (response to remand).

90. *Id.* at 39,390-91. The Commission stated that not only was further public comment unnecessary, but it would also harm investors because of the sufficiency of the current information and the cost of additional fact-finding. *Id.* at 39,391.

91. *Id.* at 39,390.

92. *Chamber II*, 443 F.3d 890, 895 (D.C. Cir. 2006).

substantive errors.[93] Both dissents are highly critical of the actions of Chairman Donaldson and the swift re-adoption of the New Rules.[94] On the same day that the D.C. Circuit remanded the New Rules, Chairman Donaldson's staff concluded only hours after the remand that the SEC's previous record was adequate to satisfy the Court's instructions.[95] Commissioner Glassman explained that these actions, along with others taken in the week before the re-adoption, elevated "form over substance once again" and were a result of the Majority Commissioners' fears that the SEC would not re-adopt the New Rules absent Chairman Donaldson.[96] Both Commissioner Atkins and Glassman believe that a more methodical and deliberate approach, such as roundtable discussions, further public comment, and formal or empirical surveys, should have been taken by the SEC in response to *Chamber I*.[97]

When re-adopting the New Rules the SEC was forced to justify why the New Rules were cost-efficient, which it did with information that the SEC claimed to have had in the original record and through publicly available information.[98] The cost of the independent chair cited by the SEC includes hiring additional employees and an independent attorney, recruitment costs, and the increased salary demanded by independent chairs.[99] Mutual funds, however, may lessen this cost by choosing the new independent chair from the currently presiding independent directors.[100] The cost of hiring new independent directors also includes recruitment costs, additional yearly compensation,[101] and additional independent attorneys.[102] According to the Chamber of Commerce, however, the

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93. Investment Company Governance, 70 Fed. Reg. at 39,403, 39,405-06 (Glassman and Atkins, dissenting) (response to remand).

94. *Id.* at 39,403 (Glassman, dissenting).

95. *Id.*

96. *Id.* In addition, Chairman Donaldson elevated form over substance by departing from normal procedures regarding "sunshine notices" of open meetings as proscribed in the Code of Federal Regulations and requiring Commissioners Glassman and Atkins to submit their dissents prior to the meeting. *Id.* Commissioner Glassman and Atkins were also given the final release to be considered at the meeting where the vote for re-adoption would take place the night before the meeting, thus giving them less than twenty-four hours to reconsider the New Rules. *Id.* at 39,406 (Atkins, dissenting).

97. *Id.* at 39,408 (Atkins, dissenting).

98. *Id.* at 39,391.

99. Opening Brief of Petitioner-Appellant at 22, Chamber of Commerce v. Sec. and Exch. Comm'n, 412 F.3d 133 (D.C. Cir. 2005) (No. 05-1240).

100. *See* REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *146.

101. In 2002, the median compensation for an independent director at a large mutual fund was $113,000 a year, while the compensation at smaller mutual funds was $18,000 a year. Investment Company Governance, 69 Fed. Reg. 46,378, 46,391 n.24 (Sec. and Exch. Comm'n Aug. 2, 2004) (to be codified at 17 C.F.R. pt. 270). This does not include recruitment costs or non-compensation costs. *Id.*

102. Investment Company Governance, 70 Fed. Reg. at 39,392 (response to remand).

SEC based these costs on information that is outside the record, extremely subjective, and in a few instances, even biased.[103]

The monetary cost for replacing an affiliated director with an independent director is approximately $400,000 per mutual fund board for the first year, while the cost of changing the board composition to seventy-five percent independent is approximately $650,000 for the first year.[104] Although nearly sixty percent of mutual fund boards meet the seventy-five percent independent board requirement, eighty percent of mutual fund boards, which is approximately 3700 funds, will have to elect or nominate a new independent chair.[105] This includes the two largest investment companies, Vanguard and Fidelity.[106] This equates to a cost of over one million dollars for a mutual fund that has to change both the board composition and the affiliated chair to an independent chair; a sum which is even more burdensome for smaller mutual funds.[107] Moreover, there are also non-monetary costs such as the knowledge and expertise that is lost by not having an affiliated chair.[108]

D. Reaction of the Chamber of Commerce and the D.C. Circuit to the SEC's Subsequent Actions

On September 21, 2005, the Chamber of Commerce again filed a brief with the D.C. Circuit asking it to review the SEC's re-adoption and strike down the seventy-five percent independent board and chair requirements.[109] The President and CEO of the Chamber of Commerce, Thomas Donahue, was outraged at the SEC's actions and stated "[t]he SEC didn't meet their [sic] legal requirements the

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Although additional staff hired by the independent directors has been said to be an additional cost, the New Rules do not require the hiring of this staff; instead, it is at the discretion of the directors. *See* REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *147.

103. Opening Brief of Petitioner-Appellant, *supra* note 99, at 22-23.

104. *Id.* at 24.

105. Cynthia A. Glassman, S.E.C. Comm'r, Statement by SEC Commissioner Regarding Investment Company Governance, Statement before the Sec. and Exch. Comm'n Open Meeting (June 23, 2004), http://www.sec.gov/news/speech/spch062304cag.htm [hereinafter Glassman Statement]; Paul S. Atkins, S.E.C. Comm'r, Statement By SEC Commissioner Regarding Investment Company Governance (June 23, 2004), 2004 WL 1571976, *2 [hereinafter Atkins Statement]. Prior to the New Rules original compliance date, several funds already had independent chairs, including Thrivent, One Group, and Goldman Sachs. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *156-57. In addition, Scudder, ING, UBS Brinson, and American Century all elected independent chairs prior to the original compliance date. *Id.* at *157.

106. Schmidt, *supra* note 88, at B15.

107. Opening Brief of Petitioner-Appellant, *supra* note 99, at 24-25.

108. Investment Company Governance, 70 Fed. Reg. 39,390, 39,394 (Sec. and Exch. Comm'n July 7, 2005) (to be codified at 17 C.F.R. pt. 270) (response to remand).

109. Opening Brief of Petitioner-Appellant, *supra* note 99, at 30.

first time around and today's effort is no different. . . . It's outrageous that a regulatory agency would deliberately ignore the orders of a U.S. court of appeals and disregard calls for a reasoned rulemaking process."[110] Moreover, former SEC Chairman Harvey L. Pitt originally supported the SEC's adoption of the New Rules, but since has stated:

> If the SEC were evaluating this behavior by the Chairman and two directors of a publicly-held corporation intent on trampling the rule of law and the rights of the minority as lame ducks and expiring terms . . . its Enforcement Staff would be all over the perpetrators of such conduct, as it should be, and the agency would be expressing appropriate pieties about transparency, governance, and protecting the rights of public investors.[111]

On April 7, 2006, the D.C. Circuit vacated the New Rules.[112] In *Chamber II*, the court first upheld the Chamber of Commerce's standing and ruled that the SEC's decision to re-adopt the New Rules prior to the court's mandate in *Chamber I* was permissible.[113] The manner in which the SEC re-adopted the New Rules after *Chamber I*, however, was not permissible and violated section 553 of the APA.[114]

Although the D.C. Circuit in *Chamber I* gave the SEC the discretion to decide whether to take further public comment,[115] the SEC is still obligated under the APA to abide by the notice and comment requirements, even when re-adopting a rule.[116] The SEC failed to abide by these requirements by relying on material, specifically a private survey of mutual fund corporate governance and compensation practices, which was outside the rule-making record.[117] In addition, this new material was the only basis for the SEC's cost estimate when re-adopting the New Rules, and thus the material was "primary," not just "supplementary," information.[118] The Chamber of Commerce, along with other interested parties, should have had the opportunity to review, analyze, and comment on the new information on which the SEC based the re-adoption of the New Rules.[119]

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110. *SEC Again Adopts Mutual-Fund Governance Rule, U.S. Chamber of Commerce v. SEC*, ANDREWS SEC. LITIG. & REG. REP., July 13, 2005, at 3.

111. Opening Brief of Petitioner-Appellant, *supra* note 99, at 44 n.9 (quoting Letter from former Chairman Harvey L. Pitt (June 23, 2005), at 3-4).

112. *Chamber II*, 443 F.3d 890, 909 (D.C. Cir. 2006).

113. *Id.* at 897-99.

114. *Id.* at 908.

115. *Id.* at 900.

116. *Id.* at 899. An agency does not need to have additional notice and comment when additional facts relied on during the re-adoption of a rule merely supplement information in the rule-making record. *Id.* at 900.

117. *Id.* at 901-02.

118. *Id.* at 902-03.

119. *Id.* at 904-06.

Due to the SEC's failure to allow further notice and comment, the D.C. Circuit vacated the New Rules; however, since numerous mutual funds have already come into compliance with the New Rules, the D.C. Circuit is allowing the SEC to have ninety days in which to reconsider and re-adopt the New Rules.[120] Although the future actions of the SEC are unclear, especially since the SEC is now under the new leadership of Chairman Cox,[121] it is imperative that they reopen the rule-making record for comment if the New Rules are re-adopted.[122]

III. THE NEW RULES DO NOT OPTIMALLY ACHIEVE THE GOALS OF THE SEC

A. The New Regulations Might Not Have Prevented Recent Mutual Fund Scandals

The SEC designed the newly required independent chair to provide an additional safeguard against conflicts of interest by vigilantly overseeing fund management, and thus preventing the illegal transactions that have led to the recent mutual fund scandals. The New Rules, however, may not have prevented these scandals.[123] The "documented abuses" of the recent mutual funds scandals have not involved transactions covered by the Exemptive Rules.[124] The SEC, however, believes that the recent mutual fund scandals indicate a "systemic industry problem[,]" which the New Rules address by increasing the accountability of the investment adviser to the independent directors and chair, thus decreasing abusive and illegal practices.[125] The SEC, therefore, considers the New Rules to be "a prophylactic measure, not a response to a present problem involving abuse of the Exemptive Rules."[126]

Proponents of the New Rules stress that eighty percent of boards involved in the recent scandals have had inside chairs; however, this statistic is misleading and does not itself entirely support the independent chair requirement.[127] This is because "approximately eighty percent of *all* fund firms have interested

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120. *Id.* at 909.

121. *See* Lynn Hume, *Judges Side with Chamber: SEC Must Decide on Mutual Fund Rule*, 356 THE BOND BUYER 1 (2006).

122. *Chamber II*, 443 F.3d at 909. The D.C. Circuit reasoned that the SEC is the best judge of whether the New Rules should be re-adopted a second time in order to achieve uniform corporate governance of mutual funds. *Id.*

123. *See* Karmel, *Mutual Funds*, *supra* note 2, at 933.

124. *Chamber I*, 412 F.3d 133, 141 (D.C. Cir. 2005).

125. Brief for CFA Institute as Amici Curiae Supporting Respondents, Chamber of Commerce v. Sec. and Exch. Comm'n, 412 F.3d 133 (D.C. Cir. 2005) (No. 04-1300), *available at* 2005 WL 596760.

126. *Chamber I*, 412 F.3d at 141.

127. *See* Investment Company Governance, 69 Fed. Reg. 46,378, 46,391 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270) (final rule).

chairpersons . . . suggest[ing] only that funds with inside chairs are proportionally implicated in the abusive activity."[128] Because the SEC did not sample mutual funds with independent chairs and inside chairs at the same rate, and the SEC created the enforcement data,[129] the statistics regarding the percentage of inside chairs involved in mutual fund scandals is questionable. By maintaining an inside chair, as opposed to an independent chair, the chair is more likely to be aware of abusive, illegal, or other harmful activities within the management company due to his access to information and the management arrangement.[130] This gives an inside chair a better opportunity to inform the board of abusive or illegal practices, allowing the board to take corrective action.[131]

The New Rules also may not prevent future mutual fund scandals because many of the illegal and abusive transactions have involved mutual funds working with entities that are not subject to the Exemptive Rules.[132] Many of these recent mutual fund scandals have involved hedge funds advisers that have participated in the late trading and market timing of mutual funds.[133] The hedge fund advisers have been able to exploit mutual fund shareholders by agreeing with mutual fund advisers to overlook prohibitions on market timing in order for the investment adviser to receive what has been coined "sticky assets."[134] The SEC stated that almost forty hedge funds and at least eighty-seven hedge fund advisers have been involved in mutual fund scandals or are currently under investigation in connection with these scandals.[135]

One of the most publicized mutual fund scandals involved the hedge fund Canary Capital Partners and its investment adviser Canary Investment Management, LLC (collectively "Canary").[136] By working with numerous mutual funds, Canary was able to partake in late trading and market timing, resulting in Canary receiving tens of millions of dollars, fund managers receiving

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128. *Id.*; Initial Opening Brief of Petitioner, *supra* note 54, at 9 n.14.

129. Initial Opening Brief of Petitioner, *supra* note 54, at 9 n.14.

130. Investment Company Governance, 69 Fed. Reg. at 46,391 (Glassman and Atkins, dissenting) (final rule).

131. *Id.* The dissenting commissioners explained that "[a] common feature of these [scandals] is that boards were not told of the formal or informal arrangements permitting market timing." *Id.*

132. *See Chamber I*, 412 F.3d 133, 140-41 (D.C. Cir. 2005); Reply Brief of Petitioner at 7, Chamber of Commerce v. Sec. and Exch. Comm'n, 412 F.3d 133 (D.C. Cir. 2005) (No. 04-1300).

133. Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 72,054, 72,056 (Sec. and Exch. Comm'n Dec. 10, 2004) (to be codified at 17 C.F.R. pts. 275 and 279).

134. *Id.* at 72,056-57. "Sticky assets" occur when hedge fund advisers deposit assets into other funds managed by a mutual fund adviser. *Id.* at 72,057. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *73.

135. Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. at 72,057.

136. Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act of 1940 Release No. 2266, 2004 WL 1636422, *5-6 (proposed July 20, 2004).

substantial management fees, and mutual fund shareholders losing millions of dollars.[137] One such arrangement occurred between Canary and three subsidiaries of Federated Investors, one of America's largest mutual fund managers.[138] In only six months, Canary had $1.6 billion in market timing transactions with Federated Funds and earned a net profit of over $4.9 million.[139] These monetary amounts, however, are small compared to what Canary paid in a settlement with the New York Attorney General due to its involvement in numerous mutual fund scandals.[140]

By intensifying board independence, the SEC brings added scrutiny only to those transactions covered under the Exemptive Rules,[141] such as Rule 17a-7, which allows a mutual fund to conduct securities transactions with other mutual funds that have common officers, directors, or investment advisers, with approval of a majority of the independent directors.[142] Although hedge funds like Canary could not have conducted these abusive and illegal activities without the aid of mutual fund directors and advisers, the added scrutiny brought by the independent directors may not prevent future abuses involving the corroboration of mutual funds and hedge funds until the SEC begins to stringently regulate and monitor hedge funds.[143] This is because hedge fund advisers, until recently, have not been required to register with the SEC, and thus, the SEC has not been able to review their trading activities with respect to mutual funds.[144]

B. Current Regulations Under the Investment Company Act Amply Protect Investors and Address the Issues Raised by the Majority Commissioners

In 2001, less than two years prior to adopting the New Rules, the SEC required that a board of directors consist of a majority of independent

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137. *Id.*

138. *In re* Federated Inv. Mgmt. Co., Federated Sec. Corp. and Federated S'holder Serv. Co., Investment Advisers Act of 1940 Release No. 2448, Investment Company Act of 1940 Release No. 27,167 (Nov. 28, 2005), at *5.

139. *Id.* Canary also entered into abusive or illegal transactions with Invesco, PIMCO, Alliance Capital, and subsidiaries of Bank of America, FleetBoston, Financial Corporation and Banc One. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *68.

140. Hurst, *supra* note 18, at 135. "Canary and its managers agree[d] to make restitution of $30 million to the [mutual] funds involved and also to pay a $10 million penalty." *Id.*

141. Reply Brief of Petitioner, *supra* note 132, at 8.

142. 17 C.F.R. § 270.17a-7 (2005).

143. The SEC recently passed rules requiring that investment advisers of hedge funds register with the SEC under the Investment Advisers Act. Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 72,054, 72,054 (Sec. and Exch. Comm'n Dec. 10, 2004) (to be codified at 17 C.F.R. pts. 275 and 279). All hedge fund investment advisers were required to register by February 1, 2006. *Id.*

144. Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act of 1940 Release No. 2266, 2004 WL 1636422, *38 n.44 (proposed July 20, 2004).

directors.[145] When adopting this requirement, the SEC stated that a majority of independent directors is able to "permit, under state law, the independent directors to control the fund's 'corporate machinery' i.e., to elect officers of the fund, call meetings, solicit proxies, and take other actions without the consent of the adviser" and have a "more meaningful influence on fund management and represent shareholders from a position of strength."[146] Moreover, a majority of the independent directors has to approve all underwriting and advisory contracts,[147] allowing the independent directors to have control of one of the most important tasks that the board is statutorily required to undertake.[148]

1. A Majority or Super-Majority of Independent Directors Could Require an Independent Chair.—Under the 2001 amendments, a majority of independent directors could require an independent chair if they felt this would best protect the interest of the shareholders.[149] The proposed requirement of a mandatory independent chair, however, undermines the independent directors' authority to elect a chair of their choice[150] by imposing a "regulatory fiat."[151] Opponents of the New Rules stated that if the SEC succeeds in passing the super-majority requirement, the independent chair requirement is even more unnecessary because a super-majority of independent directors can undoubtedly elect an independent chair.[152] Moreover, a super-majority of independent directors can "determine the outcome of any matter put to a board vote and can effectively control all aspects of the board process, including the scheduling and duration of meetings, [and] the flow of information prior to and during board meetings."[153] The SEC, however, believes that even with a super-majority of independent

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145. 15 U.S.C. § 80a-10 (2000); Investment Company Governance, 69 Fed. Reg. 46,378, 46,390 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270).

146. *Id.* at 46,391 (quoting the 2001 Adopting Release) (Glassman and Atkins, dissenting).

147. *Id.* at 46,390 (Glassman and Atkins, dissenting).

148. *See id.*

149. *Id.* at 46,391 (Glassman and Atkins, dissenting).

150. Letter from Stuart H. Coleman, Chair Comm. on Inv. Mgmt. Regulation, Ass'n of the Bar of the City of New York, to Jonathan G. Katz, Sec'y, Sec. and Exch. Comm'n * 3 (Mar. 9, 2004), 2004 WL 3388074; Investment Company Governance, 69 Fed. Reg. at 46,391 n.26 (explaining that what works well for one mutual fund board may not be the best choice for another, and in some cases the board of directors may want to choose an independent chair).

151. Glassman Statement, *supra* note 105, at *2.

152. Letter from Eric D. Roiter, Senior Vice President and Gen. Counsel, Fidelity Mgmt. and Research Co., to Jonathan G. Katz, Secretary, U.S. Sec. and Exch. Comm'n (Mar. 10, 2004), http://www.sec.gov/rules/proposed/s70304/fidelity031804.htm [hereinafter Roiter Letter]; *see* HAROLD S. BLOOMENTHAL, *Investment Companies and Investment Advisers* (pt. 1), *in* 1 SEC. LAW HANDBOOK § 20:1.10 (2006).

153. Roiter Letter, *supra* note 152. The SEC's Director of the Division of Investment Management, Paul Roye, testified before the House Financial Services Subcommittee on Capital Markets that he did not back the independent chair requirement because it deprived the directors of the ability to make a business judgment that was in the best interest of the shareholders. *Id.*

directors, the board may "not feel sufficiently empowered" to override the powerful objections of the management company by electing an independent chair.[154]

Regardless of whether a majority or super-majority of independent directors is required, by not allowing the board to elect or nominate a chairman of their choice, the new regulations vest less power in the independent directors than they formerly had, and prevents them from making decisions that they believe are in the best interest of the shareholders.[155] The Majority Commissioners, however, explained that the independent directors are not usurped of their power because they can still choose "the most qualified and capable candidate"; however, this candidate "cannot serve two masters."[156]

2. Affiliated Directors Bring Expertise to the Board of Directors.—A super-majority of independent directors is not only unnecessary, but it can harm a mutual fund.[157] A board of directors should be able to work cooperatively and as a team; therefore, a mix of both independent and affiliated directors is required.[158] An affiliated chair or director brings the expertise of the management company to the board meetings that an independent chair or director does not have, or could only have with detailed study of the management company.[159] On the other hand, independent directors may have valuable outside experience and knowledge from their work in business, government, or academia.[160]

In studies evaluating the role of sub-committees within a corporation's board of directors,[161] independent directors have been shown to be essential to the audit and executive compensation committees in order to monitor conflicts of interests.[162] Inside and affiliated directors, however, increase firm performance

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154. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *144. This is even more true when the mutual fund's investment adviser sponsored or initially organized the mutual fund. *Id.*

155. *See* Initial Opening Brief of Petitioner, *supra* note 54, at 9, 23.

156. *Id.* (quoting Investment Company Governance, 69 Fed. Reg. 46,378, 46,381 (Sec. and Exch. Comm'n Aug. 2, 2004) (to be codified at 17 C.F.R. pt. 270) (final rule)).

157. *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 798 (2001).

158. *Id.* at 799. Langevoort, however, does recognize the inherent conflicts of interest in mutual funds and the need for independent directors to provide a check on "managerial overreaching." *Id.* at 814.

159. Investment Company Governance, 69 Fed. Reg. 3472, 3475 n.31 (Sec. and Exch. Comm'n proposed Jan. 23, 2004) (to be codified at 17 C.F.R. pt. 270); *see also* Initial Opening Brief of Petitioner, *supra* note 54, at 9.

160. Investment Company Governance, 69 Fed. Reg. at 46,392 n.35 (Glassman and Atkins, dissenting) (final rule).

161. *See* April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 279 (1998).

162. *Id.* at 279. In order to monitor conflict of interests, the auditing committees of investment companies must nominate an independent auditor, and the independent directors must ratify the

when placed on the finance and long-term investment committees due to their specialized expertise.[163] This again suggests that a board of directors that is composed of both independent and affiliated directors is in the best interest of the shareholder[164] because it monitors conflicts of interest while simultaneously bringing the expertise of the management company and mutual fund industry.

Some supporters of the New Rules, however, argue that an independent chair has enough expertise to lead the board effectively.[165] In addition, even if expertise is lacking, the independent chair can rely on other inside directors or personnel of the management company for information.[166]

Affiliated directors bring tactical decision-making and long term strategic planning to the board.[167] In addition, they also bring personal motivation to a board since their financial wealth and capital and professional reputation are linked to the success and integrity of the mutual fund.[168] This desire for a successful and profitable fund is motivation for directors, both affiliated and independent, to reduce fund advisory fees while compelling integrity and fair dealing within the management company.[169]

3. The New Rules Disregard Market Forces that Influence Investors.—The independent chair and the seventy-five percent independent board requirements disregard market forces that influence investors. Investors often choose a fund based upon the expertise and accomplishments of the mutual fund's adviser and management, not the board of directors.[170] Moreover, investors are also influenced by prior illegal and abusive activities and choose funds that operate legally and in the best interest of the shareholders.[171] It is not difficult for

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nomination. Standards Related to Listed Company Audit Committees, Securities Act Release No. 8220, Exchange Act Release No. 47,654, 68 Fed. Reg. 18,788 (Apr. 16, 2003) (codified at 17 C.F.R. pts. 228-29, 240, 249, 274 (2004)).

163. Klein, *supra* note 161, at 277-78; *see also* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 264 (2002).

164. *See* Langevoort, *supra* note 157, at 799.

165. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *140-45. For example, the American Century (Mountain View) board elected a knowledgeable independent director, Professor Ronald Gilson, who had previously served for ten years as an independent director and is a professor of business law at Columbia Law School and Stanford Law School. *Id.* at *142.

166. *Id.* at *141.

167. *See* Bhagat & Black, *supra* note 163, at 264; Langevoort, *supra* note 157, at 806.

168. *See* Bhagat & Black, *supra* note 162, at 265; Langevoort, *supra* note 157, at 806.

169. Investment Company Governance, 69 Fed. Reg. 46,378, 46,392 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270) (final rule).

170. Investment Company Governance 69 Fed. Reg. 3472, 3473 (Sec. and Exch. Comm'n proposed Jan. 23, 2004) (to be codified at 17 C.F.R. pt. 270).

171. Atkins Statement, *supra* note 105, at *2. For example, in 2003, shareholders pulled $29 billion out of Putnam Investment Management after the SEC revealed abusive and illegal activity. James Glassman, *Fund Follies*, AMERICAN ENTERPRISE INSTITUTE FOR PUB. POL'Y RES., May 24,

disgruntled shareholders of mutual funds to redeem their shares, thereby leaving the investment advisers and management company with fewer assets to manage.[172] In addition, Commissioner Glassman has stated that "many of the top-rated funds today based on high-performance and low fees have inside chairs," and it is therefore not fair for the SEC to tell shareholders "they can no longer have the form of governance that produced this high level of performance[.]"[173] By dictating the structure of the board of directors, the New Rules ignore the market forces that influence the investors to invest in a specific mutual fund.[174]

4. The New Rules Do Not Focus on the Investment Adviser's Fiduciary Duty.—The New Rules de-emphasize the fiduciary obligations of the investment adviser by putting the responsibility of the adviser's actions on the board of directors.[175] Although the board of directors needs to monitor and thwart conflicts of interest, the investment adviser, as a fiduciary of the shareholders, has the ultimate responsibility to protect the shareholders' investments.[176] Considering that the recent mutual fund scandals have almost all involved a breach of the investment adviser's fiduciary duty, the New Rules do not place the proper emphasis on this important legal safeguard.[177]

The SEC's suit against Invesco Funds Group, the investment adviser of the Invesco complex of mutual funds, demonstrates a breach of fiduciary duty.[178] Invesco Funds Group and its CEO allegedly accepted investments from certain investors and, in exchange, permitted the investors to partake in market timing transactions in order to increase the management fees.[179] This market timing was prohibited by the mutual fund's disclosure statements and was injurious to long-term shareholders.[180] By allegedly permitting the market timing transactions and the conflict of interest caused by the increased management fees, Invesco Funds

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2004, http://www.aei.org/publications/pubID.20609,filter.all/pub_detail.asp. In addition, Putnam, Janus, and Amvescap, all fund families involved in mutual fund scandals, lost a total of $52 billion in assets in 2003, while the rest of the mutual fund industry experienced significant gains. *Id.*

172. *See* Mark J. Roe, *Political Elements in the Creation of a Mutual Fund Industry*, 139 U. PA. L. REV. 1469, 1505-06 (1991) (explaining that it is much easier for a mutual fund shareholder to deal with conflicts of interest than a shareholder in a corporation attempting to deal with conflicts of interest involving corporate managers).

173. Glassman Statement, *supra* note 105, at 2.

174. Investment Company Governance, 69 Fed. Reg. at 46,392 (Glassman and Atkins, dissenting) (final rule).

175. Atkins Statement, *supra* note 105, at *3.

176. *Id.*; *see* Burks v. Lasker, 441 U.S. 471, 481 n.10 (1979).

177. Atkins Statement, *supra* note 105, at *3. The New Rules only mention the adviser's fiduciary duties in a footnote. *Id. See* Hurst, *supra* note 18, at 154 (suggesting that an investment adviser's fiduciary duty should be strengthened in order to increase investor protection).

178. Sec. and Exch. Comm'n v. Invesco Funds Group, Inc., Litigation Release No. 18482, 81 SEC Docket 2397, *1 (Dec. 2, 2003).

179. *Id.*

180. *Id.* at *1-2.

Group breached its fiduciary duty to act in the bests interests of the shareholders.[181] This included the duty to act with the utmost good faith and to give full and fair disclosure of all material facts to the investors.[182] The independent directors of the Invesco complex of mutual funds did not fulfill their role as "independent watchdogs" due to their failure to monitor the mutual fund's management and prevent transactions that were detrimental to the shareholders.[183] Nevertheless, this does not excuse the investment adviser and the management company for breaching their fiduciary duties to shareholders.

C. The SEC Has Not Methodically Reviewed Prior Mutual Fund Regulations nor Is There Sufficient Empirical Evidence on Which to Base the New Regulations

The SEC has made no effort to thoroughly and methodically review existing corporate structure regulations, in the context of both corporations and investment companies, in over twenty years.[184] During the two-year interim, between the 2001 amendments and the New Rules, the SEC continued this trend by not examining the effect of the 2001 amendments to determine if the majority of independent directors had gained the desired control over the board of directors and the investment advisers.[185]

In addition, the SEC has not reviewed the fund performance and compliance record of those funds that already have an independent chair compared with those that have an affiliated chair.[186] In response to the SEC's expressed interest in consulting empirical data regarding independent versus affiliated chairs, Fidelity conducted a study, commonly called the Bobroff Mack Report (the "Report"), which indicates that there is a negative correlation between independently chaired funds and overall fund performance.[187] In addition, there is also no

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181. *Id.* at *2.

182. *Id.*

183. *See* Burks v. Lasker, 441 U.S. 471, 482-84 (1979).

184. Joel Seligman, *A Modest Revolution in Corporate Governance*, 80 NOTRE DAME L. REV. 1159, 1185 (2005).

185. Investment Company Governance, 69 Fed. Reg. 46,378, 46,391 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270) (final rule).

186. *Chamber II*, 443 F.3d 890, 905 (D.C. Cir. 2006); Karmel, *Key Outcomes*, *supra* note 15, at *5. The SEC stated that the data they do have relating to the correlation between fund performance and an independent chair is inconclusive. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *5.

187. Geoffrey H. Bobroff & Thomas H. Mack, *Assessing the Significance of Mutual Fund Board Independent Chairs, A Study For Fidelity Investments* (Mar. 10, 2004), http://www.sec.gov/rules/proposed/s70304/fidelity031804.htm [hereinafter Bobroff Mack Report]. "Using Morningstar's fund rankings . . . independent chair funds on average rank in the 53rd percentile (100 = best) over the past three years, while management chair funds on average rank in the 58th percentile." *Id.* This statistical variation is even more pronounced when examining fund performance over the past ten years. *Id.* Other corporate studies, however, show that there is no

correlation between independently chaired funds and lower expenses.[188] The Chamber of Commerce believes that the SEC should have given more consideration and weight to the Report.[189]

Reliable and valid empirical studies of the relationship between fund performance and director independence are difficult to create because there are varying assumptions made about "how performance is measured, which expenses should be included, what time period should be examined, and which funds should be examined."[190] In addition, a lack of available information and the multifaceted nature of the conflict of interest between a mutual fund's investment adviser and shareholders make standard methodologies difficult to use in establishing empirical evidence.[191] The SEC chose not to use the Report in its Adopting Release of the New Rules for several reasons.[192] The SEC stated, among other things, that the Report does not examine the future impact that the independent chair requirement will have on fund performance, only the past performance.[193] Furthermore, using the same statistics another commentator found that independently chaired funds performed slightly better than those with affiliated chairs,[194] with the resulting differences attributed to varying sample selections and empirical methods.[195] The SEC also stresses that the purpose of the New Rules is not to increase fund performance, but rather to increase fund compliance and decrease transactions that result from a conflict of interest.[196]

When the Chamber of Commerce brought the issue of the Report and the need for empirical studies before the D.C. Circuit, the court noted that although "acting upon the basis of empirical data may more readily be able to show it [the SEC] has satisfied its obligations under the APA," the empirical data is not necessary to justify a rule-making action.[197] Nevertheless, a comprehensive and

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correlation between the number of independent directors on a board and firm performance. Benjamin E. Hermalin & Michael S. Weisbach, *Board of Directors As An Endogenously Determined Institution: A Survey of The Economic Literature*, FED. RES. BANK N.Y. ECON. POL'Y REV. 8 (Apr. 2003).

188. Bobroff Mack Report, *supra* note 187. Other studies of investment companies, however, have found that boards with more independent directors are likely to have lower fees. Hermalin & Weisbach, *supra* note 187, at 19.

189. Caroline Bradley, *Private International Law-Making for the Financial Markets*, 29 FORDHAM INT'L L.J. 127, 180 n.34 (2005).

190. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *159-60.

191. *Id.* at *165-67.

192. Brief of Respondent at 26, Chamber of Commerce v. SEC and Exch. Comm'n, 412 F.3d 133 (D.C. Cir. 2005) (No. 04-1300).

193. *Id.*

194. *Id.*

195. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *182.

196. *Id.* at *5, 157-58.

197. *Chamber I*, 412 F.3d 133, 142 (D.C. Cir. 2005); *see* Ruder, *supra* note 18, at 48-49.

statistically sound empirical study of the correlation between independent chairs and fund performance would most likely help the SEC in justifying the New Rules.[198] This is because half of mutual fund investors indicate fund performance as the number one factor in influencing their impression of the mutual fund industry, while two thirds of investors claim that fund performance is very important in shaping their impression of the mutual fund industry.[199] Moreover, sixty-five percent of investors stated that fund performance is the most important reason that they own mutual funds.[200]

In addition to the SEC's lack of strong empirical evidence linking board and chair independence to better fund performance, the SEC also lacks empirical evidence linking board and chair independence to favorable compliance records.[201] The SEC stated, however, that this empirical evidence was impossible to analyze "because there is no clear method for measuring the quality of compliance by funds and their advisers," especially since "enforcement actions are only one indication of compliance."[202] Despite this, the SEC has brought recorded enforcement actions against mutual funds with the corporate structure proposed by the New Rules. Among the funds that have independent chairs, several of them have been involved in enforcement actions involving market-timing abuses.[203] This includes Bank of America, Banc One, and Putnam Investment Management.[204] Moreover, in a recent action that the SEC brought against Banc One, Banc One's board of directors was seventy-five percent independent at all times while the abusive conduct was taking place.[205] In this action, Banc One was alleged of having committed numerous illegal and abusive activities that resulted in prohibited conflicts of interests.[206] This includes, among other things, market timing transactions with hedge fund advisers, failure to charge the hedge fund advisers redemption fees, and improper disclosure of confidential information.[207] Due to these abusive activities of Banc One, hedge

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198. *See* Ruder, *supra* note 18, at 51-52.

199. *Fundamentals*, *supra* note 14, at 7.

200. *Id.*

201. Karmel, *Key Outcomes*, *supra* note 15, at *4.

202. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *183.

203. Glassman Statement, *supra* note 105. In addition, "the relative proportion of late trading and market timing cases by funds with independent chairs was roughly equivalent to their relative proportion of all mutual funds." Letter from Cynthia A. Glassman and Paul S. Atkins, Comm'rs, Sec. and Exch. Comm'n, re: Staff Report on the Exemptive Rule Amendments of 2004: The Indep. Chair Condition, to Thad Cochran, Chairman, Comm. on Appropriations, United States Senate (Apr. 29, 2005), 2005 SEC Lexis 1032, at *2-3.

204. Atkins Statement, *supra* note 104, at *3.

205. *In re* Banc One Investment Advisors Corporation and Mark A. Beeson, Investment Advisers Act of 1940 Release No. 2254, Investment Company Act of 1940 Release No. 26,490, 83 S.E.C. Docket 695, 84 S.E.C. Docket 2404, at 17 n.3 (June 29, 2004).

206. *Id.* at 1-3.

207. *Id.*

fund advisers received millions of dollars.[208] Independent directors have also been involved in enforcement actions for failing to meet their legal duties.[209]

D. The Disclosure Alternative

The SEC, in their original adoption of the New Rules, failed to consider the disclosure alternative that the two dissenting commissioners raised, thereby violating the APA.[210] The disclosure alternative would require mandatory disclosure of whether the chair of the board of directors is independent or affiliated with the management company, therefore allowing investors to choose a fund based upon their perceived importance of an independent chair.[211] Although the SEC is not required to analyze every alternative when proposing a new rule, they are required to analyze those alternatives that are not uncommon or frivolous.[212] The SEC originally claimed that they did not need to analyze the disclosure alternative because Congress rejected a "purely disclosure-based approach" to the ICA; however, in *Chamber I*, the D.C. Circuit rejected this argument since Congress does require extensive disclosure for many matters relating to investment companies.[213]

On remand, the SEC reconsidered and rejected the disclosure alternative.[214] They believe that the disclosure of whether the chair was independent would not adequately protect investors from the inherent conflicts of interest that arise from the relationship between the shareholders and the investment adviser.[215] This is because disclosure itself cannot prevent investment advisers and the management company from putting their own interests ahead of the shareholders by engaging in self-dealing, abusive, or illegal transactions.[216] Moreover, disclosure of a management-affiliated chair would not obtain the benefits that the New Rules are attempting to seek, such as encouraging open dialogue and increased oversight

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208. *Id.* at 1-5.

209. REPORT IN ACCORDANCE WITH THE CONSOLIDATED APPROPRIATIONS ACT, *supra* note 4, at *32 n.44. The SEC implicated independent directors of abusive and illegal activities while serving on the boards of Parnassus Investments, Rockies Fund, Inc., and Monetta Financial Services, Inc. *Id.*

210. *Chamber I*, 412 F.3d 133, 145 (D.C. Cir. 2005); *see* Karmel, *Key Outcomes*, *supra* note 15, at *3.

211. Investment Company Governance, 69 Fed. Reg. 46,378, 46,393 (Sec. and Exch. Comm'n Aug. 2, 2004) (Glassman and Atkins, dissenting) (to be codified at 17 C.F.R. pt. 270) (final rule).

212. *Chamber I*, 412 F.3d at 144-45.

213. *Id.* at 144 (explaining that the ICA requires mutual funds to make extensive disclosures, including filing a registration statement with the SEC, sending semiannual reports to investors, and making all filed documents publicly available); *see* 15 U.S.C. §§ 80a-8(b) (2000).

214. Investment Company Governance, 70 Fed. Reg. 39,390, 39,396-97 (Sec. and Exch. Comm'n July 7, 2005) (to be codified at 17 C.F.R. pt. 270) (response to remand).

215. *Id.*

216. *Id.* at 39,397.

by the board of directors.[217]

The SEC also rejected the disclosure alternative due to investors' lack of knowledge about the complex conflicts of interest that are inherent in mutual funds.[218] In order to make the disclosure of an independent or management affiliated chair meaningful, the investor would first have to understand the significance and impact that the chair can have on board and management oversight.[219] Without this understanding, the investor cannot make the proper decisions with the disclosed information. Moreover, disclosure to shareholders by investment advisers about conflicts of interests can increase the shareholders trust in the management and investment adviser, as opposed to making the shareholder more skeptical and cautious.[220] This trust could cause the shareholders to place greater weight on the biased advice.[221] In addition, excessive disclosure could also have a chilling effect on the entry of new mutual funds to the industry.[222]

Commissioners Glassman and Atkins believe that the SEC's reconsideration of the disclosure alternative was inadequate.[223] Their statements highlight one of the many alleged procedural errors demonstrated by the SEC. The SEC originally did not seek specific comment on the disclosure alternative; thus, there was sparse public comment to determine if others, including investors and the mutual funds themselves, believed disclosure to be a viable alternative.[224] Moreover, in *Chamber I*, the D. C. Circuit told the SEC to use its "expertise" and "best judgment" to examine the disclosure alternative; however, the SEC asked neither Commissioners Glassman nor Atkins to comment on or analyze the alternative.[225] The failure of the Majority Commissioners to ask Commissioners Glassman and Atkins about the merits of the disclosure alternative is ironic since they originally proposed the alternative.

The disclosure alternative is parallel to the SEC's goal of providing

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217. *Id.*

218. *Id.*; *see* Bullard, *supra* note 3, at 1148 (asking if "the problem of fund disclosure lay with the complexity of funds themselves"); *see* Barbara Black & Jill Gross, *The Elusive Balance Between Investor Protection and Wealth Creation*, 26 PACE L. REV. 27, 37 (2005) (explaining that many investors are ignorant about basic investment decisions, and thus educating investors is one of the best ways to foster investor protection); *see* Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 20-21 (2005).

219. *See* Investment Company Governance, 70 Fed. Reg. at 39,397 (response to remand).

220. *See* Cain et al., *supra* note 218, at 6-7.

221. *See id.* In addition, the requirement of added disclosure can cause investment advisers to embellish "their advice in order to counteract the diminished weight that they expect [shareholders] to place on it." *See id.* at 7. Therefore, the disclosed information is less reliable. *Id.*

222. Bullard, *supra* note 3, at 1148.

223. *See generally* Investment Company Governance, 70 Fed. Reg. at 39,390 (Glassman and Atkins, dissenting) (response to remand).

224. *Id.* at 39,404 (Glassman, dissenting).

225. *Id.* at 39,407-08 (Atkins, dissenting).

transparent markets in order to increase investor protection in the securities arena.[226] Even if the SEC ultimately deems the disclosure alternative to be insufficient due to lack of investor knowledge or the psychological effects that disclosure can have on investors and advisers, the SEC should only make this judgment after serious analysis and consideration. This is because one of the purposes of all the securities statutes, including the Investment Advisers Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the ICA, is full disclosure in order to obtain ethical business practices within the securities industry.[227]

CONCLUSION

The SEC's New Rules attempt to prevent future mutual fund scandals and increase investor protection and confidence by enhancing the integrity and honesty of the mutual fund industry. Within the past few years, numerous scandals have revealed directors, management companies, and investment advisers engaging in abusive and illegal transactions that adversely affect the interest of shareholders. Although it is imperative that the SEC takes action to correct these wrongdoings and instill an improved sense of trust in investors due to the continued growth of the industry, the adoption of the New Rules may not be the best course of action for the SEC.

The long-term effects of a majority of independent directors are not yet known, and there is a lack of reliable empirical evidence regarding the relationship of board independence and fund performance and compliance. Therefore, it is difficult to tell the impact that a super-majority of independent directors along with an independent chair will have on the oversight of the management company and the protection of investors. Although, the independent directors may be in a better position to promote an open and honest dialogue within the boardroom, the cost to shareholders may be significant and detrimental. This includes not only monetary costs, but also non-monetary costs, such as the loss of expertise, the de-emphasis of market forces and the investment adviser's fiduciary duty, and the lack of choice independent directors will have when nominating a new chair. Furthermore, other recently adopted SEC rules, such as requiring mutual funds to obtain a chief compliance officer[228] and the registration of hedge funds,[229] may provide some of the necessary safeguards to

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226. Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 72,054, 72,059 (Sec. and Exch. Comm'n Dec. 10, 2004) (to be codified at 17 C.F.R. pts. 275 and 279).

227. Sec. and Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

228. *See* Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74,714, 74,721 (Sec. and Exch. Comm'n Dec. 24, 2004) (to be codified at 17 C.F.R. pts. 270, 275, 279).

229. *See* Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. at 72,054.

prevent future illegal and abusive behavior.

The Chamber of Commerce's lawsuits against the SEC challenged both procedural and substantive aspects of the New Rules. Although the future of the New Rules is uncertain due to the D.C. Circuit's second remand, the court made it clear that the SEC has the power to re-adopt the New Rules a third time if the SEC takes the proper procedural steps, including further public comment.[230] Therefore, regardless of whether the SEC re-adopts or vacates the New Rules, it should comprehensively study the arguments for and against board independence since it is an issue that will continue to loom overhead.[231]

Although the Chamber of Commerce's lawsuit against the SEC may not result in the ultimate abandonment of the New Rules, it has given the SEC and other regulatory agencies greater knowledge of the proper procedural processes to be followed when engaging in rule-making. In addition, the SEC is now aware of the public, political, and legal backlash caused by a rushed re-adoption of regulations not based on empirical studies or public comment. Unless the SEC abandons the New Rules, both critics and supporters will be watching and waiting to see if the SEC strikes out for a third time with the D.C. Circuit.

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230. *See Chamber II*, 443 F.3d 890, 909 (D.C. Cir. 2006).

231. *Id.* at 904.

CLASSIFICATION OF ENEMY COMBATANTS AND THE USURPATION OF JUDICIAL POWER BY THE EXECUTIVE BRANCH

MICHELLE MASLOWSKI*

INTRODUCTION

> The accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.[1]

Recently, the President's authority to fight the war on terror has come under attack from all directions. In December 2005, the President disclosed a secret domestic eavesdropping program that allowed the Executive Branch to listen to domestic calls without a warrant.[2] This revelation produced more than just new lawsuits. Members of Congress, including members of the President's own political party, publicly criticized the President's alleged by-pass of the Foreign Intelligence Surveillance Act ("FISA") Court which was created for this very purpose.[3] Hearings were set to ascertain the legality of the program and to inquire why the Executive failed to fully notify Congress of the program.[4] The President strongly supported the program as essential to fighting the war on terror and cited the Authorization for Use of Military Force ("AUMF") as the basis of his authority.[5]

The courts also started to question the broad exercise of power the President has been using in the name of fighting terrorism. In July 2005, the Fourth Circuit upheld the President's authority to hold an American citizen, Jose Padilla, as an

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1. THE FEDERALIST NO. 47, at 244 (James Madison) (Buccaneer Books 1961).

2. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

3. Eric Lichtblau & Scott Shane, *Basis for Spying in U.S. Is Doubted*, N.Y. TIMES, Jan. 7, 2006, at A1.

4. Douglas Jehl, *Specter Vows a Close Look at Spy Program*, N.Y. TIMES, Jan. 16, 2006, at A11.

5. Eric Lichtblau, *Gonzales Invokes Actions of Other Presidents in Defense of U.S. Spying*, N.Y. TIMES, Jan. 25, 2006, at A19. Congress passed the AUMF days after the September 11 attacks and allows the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

enemy combatant.[6] In an attempt to preempt the Supreme Court from hearing Padilla's appeal, the Executive filed criminal charges against him in Florida alleging facts far less serious than those asserted in the argument in support of Padilla's enemy combatant status.[7] The Executive asked that the Fourth Circuit vacate its own opinion and transfer Padilla into Florida's custody.[8] The Fourth Circuit demanded that the Executive reconcile the discrepancy in facts alleged in the Florida criminal case and those that were alleged in July 2005.[9] Upon the Executive's failure to respond, the court denied the Executive's motion to vacate and transfer, arguing that the President could not thwart the judicial process by classifying and de-classifying enemy combatants when it suited the Executive's will.[10] Even though history leans in favor of the President's ability to detain any individual during a time of war,[11] the President's authority to detain individuals captured on American soil is vulnerable.[12] The courts' waning patience with the Executive could subject the presidential classification of individuals detained outside the combat zone to a separation of powers attack in the future.

This Note attempts to analyze the Executive's ability to classify individuals captured away from the battlefield using the separation of powers doctrine. In Part I of this Note, the doctrine of separation of powers is briefly discussed. Specifically, it examines violations of the doctrine of separation of powers and the policies underlying these determinations. Part II compares the executive classification of enemy combatants with criminal preventative detention determinations, a traditionally judicial function. Part III analyzes how the presidential classification violates the separation of powers doctrine by having an executive branch official act in a judicial manner. Part IV addresses the arguments that the Authorization for Use of Military Force and the President's war powers authorize the classification. Part V addresses the policy implications of this violation of separation of powers. Part VI concludes by calling for a neutral third party to classify individuals captured away from the battlefield, attempting to preserve the separation of powers while simultaneously guarding against infringements on the fight against terrorism.

I. AN ANALYSIS OF THE SEPARATION OF POWERS DOCTRINE

When debating the formation of the U.S. Constitution, the founding fathers differed as to the potential roles of the Executive Branch. The framers of the

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6. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

7. *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005).

8. *Id.* at 583.

9. *Id.* at 584.

10. *Id.* at 587.

11. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding the President's power, in 1944, to detain 120,000 citizens of Japanese ancestry in an effort to curb the fears of sabotage related to the attack on Pearl Harbor).

12. *The President's Wartime Powers Under Challenge*, ECONOMIST, Jan. 14, 2006, at 70.

Constitution were well aware of abuses by a strong Executive Branch.[13] However, the attempt to shift the power to the Legislature under the Articles of Confederation did not solve the problem—abuses still existed within the Legislature.[14] Ultimately, the Framers decided to prevent future abuses by distributing power between three independent branches that could work within their own spheres of power and provide checks against the usurpation of power by another branch.[15]

However, the framers of the Constitution did not specifically indoctrinate the separation of powers concept in the text of the Constitution. The modern conception of separation of powers states that the federal government is divided into three branches, "each with specific duties on which neither of the other branches can encroach."[16] Textual support of a theory of separation of powers includes: "All legislative Powers herein granted shall be vested in a Congress of the United States;"[17] "[t]he executive Power shall be vested in a President of the United States of America;"[18] and "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[19] However, the Constitution has no provision that explicitly announces the separation of powers doctrine. A handful of Supreme Court cases have found the doctrine to be implied by the language and distribution of power found within the Constitution.

Separation of powers analysis can flow from two schools of thought: a functionalist/pragmatic theory, and a formalist theory. Historically, the analysis swings like a pendulum between the two schools.[20] The functionalist theory, summed up in the "workable government" standard created by the Court in *United States v. Nixon*,[21] argues that the boundaries between the branches are fluid and should be interpreted to allow the government to function efficiently.[22] The formalist theory argues that the boundaries of the branches are "functionally identifiable"[23] and are more rigid than the functionalist school claims. Courts have been reluctant to analyze the separation of powers doctrine due to the traditional deference given to executive decisions during times of war and have instead favored a more pragmatic approach. However, the presidential classification of individuals detained outside the combat zone is vulnerable to attack from a separation of powers analysis should the pendulum swing back towards a formalist view.

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13. INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring).
14. *Chadha*, 462 U.S. at 961.
15. *Id.* at 962.
16. BLACK'S LAW DICTIONARY 1369-70 (8th ed. 2004).
17. U.S. CONST. art. I, § 1.
18. U.S. CONST. art. II, § 1, cl. 1.
19. U.S. CONST. art. III, § 1.
20. NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 77-78 (2004).
21. 418 U.S. 683, 707 (1974).
22. *See id.*; *see also* DEVINS & FISHER, *supra* note 20, at 77.
23. INS v. Chadha, 462 U.S. 919, 951 (1983); DEVINS & FISHER, *supra* note 20, at 77.

A. INS v. Chadha

INS v. Chadha presented differing interpretations of the same action. In a unicameral process, the House of Representatives passed a resolution denying permanent resident status to a handful of aliens after the Attorney General had determined that they should remain in the United States.[24] The plaintiffs argued that Congress's action violated the separation of powers because it was performing a non-legislative function.[25] The majority agreed that the aliens should remain in the country but did not strike down the congressional action as a violation of separation of powers. The Court invalidated the House of Representative's resolution because it violated the principles of bicameralism and presentment.[26] Chief Justice Burger argued that the House was acting in a legislative nature and therefore did not present a separation of powers issue.[27] However, because bicameral passage and presentment of the resolution had not occurred, the House ran afoul of the Constitution and the legislative veto provision was declared unconstitutional.[28]

Although the majority characterized Congress's actions as legislative in nature, Justice Powell characterized them as judicial in his concurrence. Justice Powell was bothered by Congress making a determination of the applicability of a statute to individuals.[29] He characterized the action as judicial because the resolution made a determination that six specific persons did not comply with certain statutory criteria.[30] In Justice Powell's opinion, Congress's determination interpreted the law and applied the law to individuals, which lay within the scope of the Judiciary's power, but not the Legislature's power.[31] He noted that Congress had not exercised a power that could "possibly be regarded as merely in aid of the legislative function of Congress."[32] Thus, Congress exceeded its power by usurping the power of the judiciary, independent of the procedural problems identified by the majority.[33]

The main thrust of the majority opinion is the rejection of the functionalist theory of separation of powers. Justice Burger specifically spoke to the theory when he stated that the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution."[34] The Court instead

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24. INS v. Chadha, 462 U.S. 919, 924 (1983).
25. *Id.* at 928.
26. *Id.* at 952-54.
27. *Id.*
28. *Id.* at 959.
29. *Id.* at 960 (Powell, J., concurring).
30. *Id.*
31. *Id.* at 966.
32. *Id.* at 965 (quoting Buckley v. Valeo, 424 U.S. 1, 138 (1976)).
33. *Id.* at 967.
34. *Id.* at 944.

adopted a more rigid and formalistic construction of the boundaries of each branch of government and pointed out that "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[35] It noted that the boundaries of each branch can be "functionally identifiable" and the "hydraulic pressure inherent" in each branch "to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[36] The Court thus abandoned its "workable government" standard that it had laid out five years earlier in *United States v. Nixon*[37] in favor of a more restrained government.[38]

B. Hamdi v. Rumsfeld

The functionalist versus formalist debate also took place in the enemy combatant arena. In *Hamdi v. Rumsfeld*,[39] the Judiciary first addressed the rights of an American citizen who had been classified as an enemy combatant. Yaser Hamdi was an American citizen captured in Afghanistan suspected of taking up arms against the United States.[40] The Executive classified him as an enemy combatant and held him at a military base in South Carolina.[41] Hamdi challenged his detention and argued that the indefinite detention without due process violated his constitutional rights as an American citizen.[42] The Executive argued that it had evidence against Hamdi to support the enemy combatant status and that judicial review of his status was improper.[43]

The district court in Virginia found the evidence supporting Hamdi's classification woefully inadequate. The court recognized "the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides."[44] It also acknowledged the great deference shown to the Executive in cases involving

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35. *Id.*

36. *Id.* at 951.

37. 418 U.S. 683, 707 (1974).

38. The Supreme Court reaffirmed this formalist approach in *Bowsher v. Synar*, 478 U.S. 714 (1986). The Gramm-Rudman-Hollings Act aimed at reducing the deficit and required the Comptroller General to make recommendations to the President regarding spending cuts that were then to be implemented by the President. *Id.* at 717-19. In *Bowsher*, the Supreme Court found this violated the separation of powers because a legislative agent was acting in an executive manner. *Id.* at 732. The Court reiterated its position in *Chadha*, emphasizing "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others." *Id.* at 725 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935)).

39. 542 U.S. 507 (2004).

40. *Id.* at 510.

41. *Id.*

42. *Id.* at 511.

43. *Id.* at 513.

44. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 531 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

foreign policy, national security and military matters.[45] However, the court found that the justification given by the Executive in support of the enemy combatant classification[46] failed to meet even the minimum requirements for meaningful judicial review.[47] Judge Doumar of the Eastern District of Virginia argued that the "Mobbs Declaration" was merely a "government say-so" that would amount to the rubber-stamping of the Executive's determination.[48] The court found this to be incompatible with the principles governing the war on terror: "[T]he concept of national defense cannot be deemed an end in itself, justifying any exercise of [executive] power . . . [i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[49] The court ordered that the "screening criteria" and all other evidence relied upon by the Executive in classifying Hamdi as an enemy combatant be handed over to the court.[50]

The Fourth Circuit agreed with the Executive and reversed the district court's order to produce documents and witnesses to support the classification.[51] The court held that because the military captured Hamdi in a zone of active military engagement and the war powers solely lay within the realm of the Executive and Legislative Branches, review of the classification was not proper.[52] The court emphasized the compelling state interest in keeping combatants from rejoining their comrades and further endangering American lives.[53] Hamdi appealed and the Supreme Court granted certiorari,[54] taking up the issue of whether judicial review of an enemy combatant's status was proper.[55]

Justice O'Connor wrote the plurality opinion vacating the Fourth Circuit judgment. Justice O'Connor avoided a separation of powers analysis by finding that the AUMF,[56] passed by Congress following the September 11 attacks, authorized the President to detain Hamdi as an enemy combatant. The AUMF authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks.[57] The Court also cited previous detainments of individuals in connection with war activities.[58] The Court reasoned that the classification and detainment of enemy

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45. *Id.*

46. The Executive offered evidence through an affidavit called the "Mobbs Declaration." The affidavit was used in several enemy combatant cases and is described in more detail in Part II, *infra*.

47. *Hamdi*, 243 F. Supp. 2d at 533.

48. *Id.* at 535.

49. *Id.* at 532 (quoting United States v. Robel, 389 U.S. 259 (1967)).

50. *Id.* at 536.

51. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

52. *Id.* at 473.

53. *Id.* at 466.

54. Hamdi v. Rumsfeld, 540 U.S. 1099 (2004).

55. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004).

56. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

57. *Hamdi*, 542 U.S. at 517 (quoting Pub. L. No. 107-40, 115 Stat. 224 (2001)).

58. *Id.* at 518-19. The Court cited *Ex parte Quirin*, 317 U.S. 1 (1942), as support for

combatants were "important incident[s] of war"[59] and therefore authorized under the AUMF.

However, Justice O'Connor did provide for a mechanism within the courts for an enemy combatant to challenge his classification. Justice O'Connor created a rebuttable presumption in favor of the enemy combatant classification, requiring that Hamdi receive notice of his enemy combatant status and an opportunity to challenge his status.[60] Should the Executive produce credible evidence in favor of the classification, the burden shifted to Hamdi to produce "more persuasive evidence that he falls outside the criteria."[61] The Court created a system with a presumption in favor of the Executive's evidence.[62] Justice O'Connor emphasized that favoring the Executive would not be unfair if Hamdi had a fair opportunity to rebut the evidence.[63]

Justices Souter and Ginsburg dissented on the issue of authorization under the AUMF.[64] Their opinion argued that the AUMF did not authorize with specificity the classification and indefinite detentions of enemy combatants.[65] Justice Souter relied on the Non-Detention Act[66] to reason that whenever an American citizen is detained without due process, Congress must give a clear statement of authorization.[67] Congress had the choice to repeal the Non-Detention Act but instead let the law remain.[68] Because a clear statement of authorization was not given in the AUMF, Justice Souter argued that Hamdi should have been released.[69] However, the courts narrowly defined the rule in

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detainment of American citizens. Quirin was a German citizen during World War II captured in New York who was suspected of plans to sabotage war industries and war facilities in the United States. *Id.* at 20. The Supreme Court rejected Quirin's petition for habeas corpus after being denied access to the courts by a presidential proclamation. *Id.* at 48. The Court held that the detainment of Quirin was incidental to the President's power as Commander-in-Chief and was authorized by Congress with the declaration of war against Germany. *Id.* at 28-29.

59. *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. at 28) (brackets in original).

60. *Id.* at 533.

61. *Id.* at 534.

62. *Id.*

63. *Id.*

64. *Id.* at 541 (Souter, J., concurring).

65. *Id.* at 542.

66. 18 U.S.C. § 4001(a) (1950). The Non-Detention Act states "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* The Act was passed after the decision in *Korematsu v. United States*, 323 U.S. 214 (1944), was handed down. Congress feared that citizens would be subject to "arbitrary executive action, with no clear demarcation of the limits of executive authority." 1971 U.S.C.C.A.N. 1435, 1438 (Apr. 6, 1971). The Act was also considered "the only existing barrier against the future exercise of executive power which resulted in" the Japanese internment. *See Hamdi*, 542 U.S. at 543 (Souter, J., concurring) (quoting 117 Cong. Rec. 31544).

67. *Hamdi*, 542 U.S. at 550-51 (Souter, J., concurring).

68. *Id.* at 542-43.

69. *Id.* at 541. Justice Scalia and Stevens dissented, arguing that the appellate court decision

Hamdi to the facts of that particular case and specifically acknowledged that the rule could become inapplicable for those captured on American soil.[70]

C. Padilla v. Hanft

The Supreme Court reversed and remanded *Padilla v. Rumsfeld* due to lack of jurisdiction, however some of the Justices hinted that they would find the detainment of an individual detained outside the zone of military operations unconstitutional.[71] The majority held that Padilla named the wrong respondent and filed in the wrong jurisdiction.[72] The Court held that only the immediate custody of the enemy combatant could be named as a respondent and that the complaint must be filed in the jurisdiction holding the detainee.[73] The Court dismissed the case without prejudice so that Padilla could file in the proper jurisdiction against the proper respondent.[74]

Justices Stevens, Souter, Ginsburg, and Breyer dissented as to the jurisdictional question and spoke directly to the merits of Padilla's detention. In the dissent's conclusion, the Justices acknowledge that detainment could be justified to prevent future attacks against the country.[75] But the dissent was quick to point out that such prevention cannot be obtained through the use of "unlawful procedures."[76] Justice Stevens concluded: "For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[77] The language in the final two paragraphs of the dissent signifies the possible use of the separation of powers doctrine to depart from the deferential review given to the Executive since September 11 and to swing the pendulum back towards the formalist view of *Chadha*.[78]

A formalist swing of the pendulum would devastate an executive classification of those captured outside the combat zone. The formalist construction of the separation of powers requires restraint by the branches of government and only allows extension of power by a clear and concise

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should be reversed because the AUMF acted as an implementation of the Suspension Clause. *Id.* at 554 (Scalia, J., dissenting). In a separate dissent, Justice Thomas argued that the Executive was fully empowered to indefinitely detain Hamdi without judicial review. *Id.* at 579 (Thomas, J., dissenting).

70. Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) ("We have no occasion . . . to address the designation as an enemy combatant of an American citizen captured on American soil.").

71. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

72. *Id.* at 442, 447.

73. *Id.*

74. *Id.* at 451.

75. *Id.* at 465 (Stevens, J., dissenting).

76. *Id.*

77. *Id.*

78. *Id.*

authorization by statute. The amorphous and vague language of the statute cited by the Executive may not be enough to save it from a formalist court if that court determines that an executive classification is essentially a judicial function being carried out by an executive agent.

II. PREVENTATIVE DETENTION

A separation of powers analysis of executive classifications first requires an analysis of the nature of that action. Should the action be characterized as a judicial action taken by an executive agent, the action would be extremely vulnerable to a separation of powers attack.

A. The Classification of Enemy Combatants Is Preventative Detention

Criminals in the U.S. justice system can be held without bail pending trial. The process, called preventative detention, protects the community from criminals who would commit other crimes if released on bail. The policy for detaining enemy combatants parallels the policy favoring the detention of suspects who have committed a crime. The goals of preventative detention and detaining enemy combatants are the same—to protect the community from future harm. The terminology may be different—"safety of the community" in the former case and "national security" in the latter case—however, the language does not change the ultimate goal.

Looking to the procedure of classifying an enemy combatant sheds some light on the general purpose of the classification and detainment. Two individuals have been captured within the United States[79] and the procedure for classifying them as enemy combatants was similar. Both Jose Padilla and Ali Saleh Kahlah al-Marri were detained in the United States pursuant to material witness warrants.[80] The Executive held al-Marri on criminal charges until a month before his trial when he was classified as an enemy combatant and transferred to military custody.[81] The Executive never charged Padilla with any criminal misconduct, but classified him as an enemy combatant approximately one month after being detained on the material witness warrant.[82]

Based on the "evidence," President Bush sent a letter to the Secretary of Defense regarding each man and directed the Secretary to take the detainees into military custody.[83] The President "hereby determine[d]" that the detainee was "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts."[84] The letter further stated that the detainee

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79. Jose Padilla was captured exiting a plane in Chicago's O'Hare International Airport and Ali Saleh Kahlah al-Marri was arrested in Peoria, Illinois. *See* Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2004); al-Marri v. Hanft, 378 F. Supp. 2d 673, 674 (D.S.C. 2005).

80. *See Padilla*, 423 F.3d at 388; *al-Marri*, 378 F. Supp. 2d at 674.

81. *al-Marri*, 378 F. Supp. 2d at 674.

82. *Padilla*, 423 F.3d at 388.

83. *Id.*

84. *Id.*

"possesse[d] intelligence . . . that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda," and "represent[ed] a continuing, present and grave danger to the national security of the United States."[85] The President concluded, "it is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain [the detainee] as an enemy combatant."[86] The letter then ordered the Secretary of Defense to take custody of Padilla and classify him as an enemy combatant.

When asked by the courts to present the evidence that the Executive relied upon to classify the men as enemy combatants, the Executive produced one affidavit, known as the "Mobbs Declaration."[87] Michael H. Mobbs, a special advisor to the Under Secretary of Defense for Policy, authored the affidavit.[88] The affidavit laid out the evidence presented to the President regarding both men that led to their classification as enemy combatants. It briefly summarized[89] the circumstantial evidence against each detainee and paralleled the same conclusory language that found its way into the President's letter to the Secretary of Defense.[90] It failed to provide the "screening criteria" used to make the classifications[91] and did not provide the qualifications of Mr. Mobbs or what procedures he used to determine the classification of the individuals.[92] Nothing within the statement addressed intelligence gathering, and it was also silent on what level of "affiliation" the individual had with al Qaeda.[93] The declaration lacked any substantive information and contained only conclusory statements regarding the men.[94] Based on this information, both men were indefinitely detained pending the end of hostilities.

In comparison, the Bail Reform Act of 1984 was a response to the growing problem of suspects committing additional crimes while out on bail.[95] The Act allowed suspects to be held without bail if a judge determined there were no conditions or combination of conditions that would reasonably assure the safety

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85. *Id.*

86. *Id.*

87. Padilla v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002), *rev'd on other grounds*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

88. *Id.*

89. The document was nine paragraphs long.

90. *Padilla*, 233 F. Supp. 2d at 572.

91. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 535 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

92. *Id.* at 533.

93. *Id.* at 534.

94. *See id.* at 535.

95. *See* United States v. Salerno, 481 U.S. 739, 742 (1987). The Bail Reform Act of 1984 specifically states: "If, after a hearing . . . , the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and *the safety of any other person and the community*, such judicial officer shall order the detention of the person before trial." 18 U.S.C. § 3142(e) (2000) (emphasis added).

of the community.[96] The purpose of the statute was to use the bail system to protect the community from crimes committed by individuals who had been released on bail. This triggered the era of preventative detention, the determination of which has largely been a judicial function.

The Executive continually argues that the classifications and indefinite detainment of enemy combatants is necessary to prevent the combatants from returning to the battlefield where they would continue to threaten American lives.[97] This goal—the goal of national security—is of the same basic nature as preventative detention. Both protect Americans against harm. Both have a forward-looking component in that they assume that the person detained has the propensity to cause additional destruction if released. The language differs only because the scale of potential destruction increases from an individual to a national scale.

B. Preventative Detention Has Primarily Been a Judicial Determination

In *United States v. Salerno*,[98] the U.S. Supreme Court upheld a challenge to the Bail Reform Act because significant judicial procedures were available to the suspect. The defendant was charged with numerous racketeering violations, extortion, and various criminal gambling violations.[99] The trial court denied bail after it determined that the defendant posed a threat to the safety of the community if released.[100] The defendant argued that the only legitimate purpose for detaining a suspect was if there were no conditions that would secure the suspect's appearance at subsequent hearings.[101] He argued that any pretrial detention necessarily violated the Fifth Amendment's prohibition of the denial of liberty without due process of law.[102] He further argued that he was being punished prematurely for a crime he had yet to commit.[103]

The majority rejected the defendant's arguments because it believed that the state interest in protecting the safety of the community outweighed the potential violation of individual rights.[104] The Court emphasized that the extensive procedural protections of the adversarial hearing afforded to the defendant sufficiently protected him against unwarranted detention.[105] These procedural safeguards included the right to counsel, the detainee's right to testify on his own

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96. *Salerno*, 481 U.S. at 742.

97. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

98. 481 U.S. 739 (1987).

99. *Id.* at 743.

100. *Id.*

101. *Id.* at 744.

102. *Id.* at 746.

103. *Id.* at 745.

104. *Id.* at 749.

105. *Id.* at 750-52.

behalf, and the right to cross-examine witnesses.[106] The Court also noted that "statutorily enumerated factors" guided the judicial officers, including the nature and circumstances of the charge, the weight of the evidence, the characteristics of the offender, and the potential danger to the community.[107] The Court found that the numerous protections given by Congress and the judicial process adequately balanced the individual's right to liberty with the compelling government interest in the safety of the community.[108]

Justice Marshall, joined by Justice Brennan, dissented from the majority opinion. Justice Marshall argued that pretrial detention without a conviction violated the fundamental principle of presumption of innocence "implicit in the concept of ordered liberty."[109] While the presumption of innocence can be difficult to accept, Justice Marshall noted that the presumption exists to protect the innocent from unwarranted detention.[110] "[T]he shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and ultimately, ourselves."[111]

Similarly, in *Denmore v. Kim*, a divided Supreme Court upheld the detention of deportable aliens for the period necessary for removal.[112] Because of statistics indicating that aliens who are released on bail while deportation is pending committed additional crimes,[113] Congress passed a statute requiring their detainment pending a determination of removability.[114] The majority noted that immigration regulations necessarily involved issues of foreign relations and the war powers—powers that normally receive high deference from the courts.[115] In a 5-4 decision, the Court held that an alien could be detained during deportation proceedings without an individualized determination of the alien's dangerousness.[116] Chief Justice Rehnquist argued that Congress is not limited to

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106. *Id.* at 751.

107. *Id.* at 751-52.

108. *Id.* at 752.

109. *Id.* at 763 (Marshall, J., dissenting).

110. *Id.* at 767.

111. *Id.*

112. Denmore v. Kim, 538 U.S. 510, 513 (2003).

113. *See id.* at 518-20. At that time, criminal aliens constituted twenty-five percent of the federal prison population. *Id.* at 518. Given the rate of deportation, it would have taken twenty-three years to deport all of the aliens within the United States that were determined to be deportable. *Id.* After being determined to be removable and released on bail, seventy-seven percent were arrested once again and forty-five percent were arrested multiple times before deportation proceedings were completed. *Id.* Additionally, twenty percent of deportable aliens who were released pending deportation failed to appear at their subsequent removal proceedings. *Id.* at 519.

114. *Id.* at 513. The statute stated, "[t]he Attorney General shall take into custody any alien who is removable from this country because he has been convicted of one of a specified set of crimes." *Id.* (quoting 8 U.S.C. § 1226(c) (2000)) (internal quotations omitted).

115. *Id.* at 522.

116. *Id.* at 528; *see also* Reno v. Flores, 507 U.S. 292, 313-14 (1993) (holding that alien juveniles set for deportation could be detained unless released to a parent, close relative or guardian

the "least burdensome means" when trying to attain a particular goal and that sufficient evidence was before Congress to indicate that deportable aliens in general were a threat to the community.[117] The Court justified the balance between an alien's due process rights and the government's interest in protecting the community by indicating that the detention was limited in duration to only that time necessary to determine removability.[118]

Justices Stevens, Souter, Ginsburg and Breyer vigorously dissented. The Justices argued that the alien contested his deportable status under the statute and thus presented a legal argument against detainment.[119] The dissent argued that legally admitted aliens contributed in a number of different ways to society and thus should be afforded the same due process rights as citizens of the United States.[120] Such due process rights can only be protected with a hearing and a neutral third party determination that detention is necessary.[121] The dissent pointed to precedent in criminal law that required a determination of a compelling state interest in detainment and that the detainment must be limited to a narrow class of individuals.[122] The Justices argued that no precedent allowed the government to avoid the Due Process Clause by "selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away."[123]

However, subsequent decisions have limited the duration of the preventative detention. In *Zadvydas v. Davis*, the Supreme Court limited the amount of time the INS could detain a deportable alien, protecting the alien from indefinite detention.[124] The alien detainee challenged the government's ability to detain him pending removal beyond the ninety days prescribed by statute.[125] The majority noted that pretrial detention had been upheld only when Congress narrowly tailored the statute to permit the detention of specific dangerous individuals and provided "strong procedural protections."[126] The Court was also

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without an individualized hearing on the suitability of other custodians); Carlson v. Landon, 342 U.S. 524, 538 (1952) (upholding the detention of aliens accused of being Communists because "[d]etention is necessarily a part of this deportation procedure").

117. *Denmore*, 538 U.S. at 528.

118. *Id.*

119. *Id.* at 541-42 (Souter, J., dissenting).

120. *Id.* at 544.

121. *See id.* at 551.

122. *Id.* at 550.

123. *Id.* at 551-52.

124. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

125. *Id.* at 686. The post-removal-period statute stated that after a final removal order has been signed ordering the deportation of an alien, the alien must be held during the ninety-day removal period. 8 U.S.C. § 1231(a)(2) (2000). It further stated that after this removal period expires, the government may continue to detain the alien if removal had not taken place. *Id.* § 1231(a)(6).

126. *Zadvydas*, 533 U.S. at 691 (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)); *see also Hendricks*, 521 U.S. at 348 (holding that preventative detention was permissible if it was

concerned that the determination of continued detainment was made in an administrative hearing where the detainee had the burden of proof in proving he was not dangerous.[127] The majority required special justification for indefinite detention that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[128] The requisite special justification and adequate procedural protections were lacking in this case and thus the Court overturned the detention order.[129]

Justice Breyer also spoke to the language of the statute. He found that the word "may" does not grant the Executive unfettered discretion.[130] If Congress had intended for the indefinite detentions of aliens who were being deported, Justice Breyer argued that the language of the statute would have been specific to that purpose.[131] The Court thus limited the amount of time the Government could detain deportable aliens to that period of time "reasonably necessary" to secure removal.[132]

Justices Scalia, Thomas, Kennedy, and Chief Justice Rehnquist dissented, arguing that the statute established "clear statutory authority" for the Executive to indefinitely detain deportable aliens.[133] They argued that the detainee's argument was internally flawed because he was arguing that he had a right to be free in a country that had decided to expel him.[134] For Justices Scalia and Thomas, as soon as the removal order was signed, it "totally extinguished" the detainee's right to be free in the United States.[135] The Executive could detain the alien until it accomplished removal.[136] Justice Kennedy and Chief Justice Rehnquist agreed partially with Justices Scalia and Thomas but in a separate dissenting opinion argued that there are some instances when a court can order the release of a removable alien.[137]

All three cases point to the need for a neutral, judicial determination of indefinite detention. In each case, an executive agent argued that detention determinations made by the Executive were constitutional without regard to the judicial review of the determinations. The Court disagreed. The *Salerno* Court

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limited to "a small segment of particularly dangerous individuals" and subject to "strict procedural safeguards"); Foucha v. Louisiana, 504 U.S. 71, 81-83 (1992) (striking down preventative detention statute that shifted the burden of proof to the detainee); United States v. Salerno, 481 U.S. 739, 747 (1987) (insisting that procedural protections were necessary to uphold pretrial detention).

127. *Zadvydas*, 533 U.S. at 692.

128. *Id.* at 690.

129. *Id.*

130. *Id.* at 697.

131. *Id.*

132. *Id.* at 689.

133. *Id.* at 702 (Scalia, J., dissenting).

134. *Id.* at 703.

135. *Id.* at 704.

136. *Id.* at 705.

137. *See id.* at 721 (Kennedy, J., dissenting) (arguing that the court may order a release of a removable alien when the detention is "arbitrary or capricious").

upheld the detentions specifically because extensive judicial protections were available to the detainee before the detention commenced.[138] The *Denmore* Court upheld the detention of deportable aliens but premised its decision on the fact that the detention would be limited in duration to the time necessary to determine deportability.[139] The *Zadvydas* Court then limited the discretion of the Executive in detaining deportable aliens to a reasonable time, thereby rejecting the Executive's argument that the Executive could indefinitely detain deportable aliens.[140] When it comes to indefinite detention, the Supreme Court has been adamant about the necessity of a judicial review of that detention to avoid abuses by the Executive.

III. EXECUTIVE CLASSIFICATION VIOLATES THE SEPARATION OF POWERS

Justice Powell explained it best when he stated: "Functionally, the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another."[141] The executive classification of enemy combatants captured away from the battlefield violates the separation of powers in both distinct ways. First, the executive classification usurps core judicial functions—fact-finding and the application of the law to an individual to determine his legal status under the law. Second, it assumes another traditionally judicial function—the indefinite detention of an individual who poses a potential threat to society.

A. Executive Classification Takes on a Function That Is a Core Judicial Function

The core functions of the judicial system lie in fact-finding and determinations of law. The Supreme Court declared that it alone had the power to determine "what the law is."[142] Any encroachment on these fundamental functions of the Judiciary would necessarily be a violation of separation of powers.[143]

The *Chadha* Court rejected an analysis of the form of a branch's action but instead looked to the substance of the action.[144] A violation occurs when the actions of one branch "contain matter which is properly to be regarded . . . in its

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138. United States v. Salerno, 481 U.S. 739, 750-52 (1987).

139. Denmore v. Kim, 538 U.S. 510, 528 (2003).

140. *Zadvydas*, 533 U.S. at 682.

141. INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (internal citations omitted).

142. Marbury v. Madison, 5 U.S. 137, 177 (1803).

143. Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 86 (2005) (arguing that indictment, trial and conviction are core functions of the courts and judicial deference to executive detention of individuals undermines those functions).

144. *See Chadha*, 462 U.S. at 952.

character and effect" as actions of another branch.[145] Just as Congress had attempted in *Chadha*, the Executive had determined the legal rights of individuals in *Padilla*. Both men detained in the United States were initially detained on material witness warrants. The executive classification that changed their status from a material witness to an enemy combatant occurred after the arrest. In effect, the executive action was an application of the law to both men and determination of their legal rights under the law.

Additionally, no congressional check on executive classifications exists. In *Chadha*, Congress had passed statutory criteria to guide the Attorney General in deciding who should remain in the country.[146] Here, no statutory criteria exist. If the Executive's interpretation of its own power is to be upheld, it would have the power to arrest the individual (an executive function), determine the criteria that must be met to be classified as an enemy combatant (a legislative function), and apply those criteria to individuals to determine whether an individual meets those criteria (a judicial function). Neither the congressional check found in *Chadha* nor a judicial check is found in the present case.

The language of the letter from the President to the Secretary of Defense ordering the classification of enemy combatant status and military detention further indicates that an executive agent is performing judicial functions. The President *determined* that the detainee was "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts."[147] According to the letter, the President also determined that the detainee "possesse[d] intelligence . . . that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda," and "represent[ed] a continuing, present and grave danger to the national security of the United States."[148] The facts asserted were those that are normally left for a jury to decide and the conclusory language regarding those facts closely parallels a statement of fact written by a judge when granting a party summary judgment.

The President then went on to interpret the criteria created by his own branch and found that "it is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain [the detainee] as enemy combatant."[149] This language is dangerously close to a finding of law given by a judge in a summary judgment decision or at the conclusion of a bench trial. The letter from the President engaged in fact-finding and application of the law when classifying individuals as enemy combatants—two functions that are at the core of the judiciary's purpose.

Justice Powell noted that the doctrine of separation of powers reflected "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[150] The statement equally applies to the Executive.

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145. *Id.*

146. *Id.* at 963 (Powell, J., concurring).

147. Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

148. *Id.*

149. *Id.*

150. *Chadha*, 462 U.S. at 962 (Powell, J., concurring).

The concerns Justice Powell had about Congress's action are present in the Executive's classification of enemy combatants. Like Congress, the President is "not subject to any internal constraints" preventing him from "arbitrarily depriving" any individual of their liberty rights.[151] Also, no "established substantive rules" bind the President.[152] The criteria used to determine whether to classify an individual as an enemy combatant are not only secret, but completely the creation of the Executive Branch. No guidance has been given by Congress or the courts as to what the criteria should be. The Executive is also not constrained by "procedural safeguards."[153] No procedure exists in which an individual can avoid being classified as an enemy combatant before the label attaches itself. The only remedy available is after the classification has already been determined. All of the dangers that Justice Powell considered inherent in a violation of the doctrine of separation of powers are present in executive classification of enemy combatants.

B. Executive Classification Assumes a Function That Has Traditionally Been Entrusted to the Judiciary

Executive classification of enemy combatants completely divests the courts of the power to determine the need for preventative detention. The procedural protections built into judicial determination of preventative detention do not exist in executive classifications. Additionally, the purposes for vesting the determination of preventative detention in the Judiciary are not served by executive classifications of those individuals captured away from the battlefield.

Executive classification completely usurps the judicial role of determining the need for preventative detention. In the cases involving Ali Saleh Kahlah al-Marri and Jose Padilla, each man was detained by civilian authorities on material witness warrants.[154] Only later were they classified as enemy combatants because the Executive independently determined that they would further endanger American lives.[155] This determination was made entirely outside the realm of the Judiciary. The Executive has yet to reveal to the courts the process or criteria used when making the determination. Not only were al-Marri and Padilla unable to challenge the classification during the determination, the men were not even aware that the determination was being made until the label had attached and they were transferred into military custody. The entire classification process is secret from both the judiciary and the suspect himself. Executive classifications assume the role of the courts and make an independent determination of the dangerousness of the detainee. This action amounts to a commandeering of the Judiciary's role in determining the potential threat an

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151. *Id.* at 966.

152. *Id.*

153. *Id.*

154. *See* Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 674 (D.S.C. 2005).

155. *Padilla*, 423 F.3d at 388; *al-Marri*, 378 F. Supp. 2d at 674.

individual poses to society, ignoring all of the policies served by judicial determinations.

The purpose of judicial determination of the potential threat a person poses to society is to avoid unwarranted detention.[156] The adversarial hearing, in which the suspect participates, provides a backstop to prevent the incarceration of an innocent man or the incarceration of a person who would commit no crime if released. The suspect's ability to present evidence on his behalf, the ability to cross-examine adverse witnesses and the burden of proof resting on the government to prove dangerousness all allow the suspect to fight to retain his liberty interest. When dealing with the unpredictability of the forecasting of future action, the government should prove that such drastic current action is necessary. The Supreme Court has repeatedly insisted that such burden lies with the government to preserve the long-held presumption of innocence.

The Executive has played to the emotions of the courts by emphasizing the United States's compelling interest in detaining enemy combatants as justification for abandoning the presumption of innocence in support of executive classification. However, the compelling nature of this interest neither justifies an abandonment of this presumption nor cures the separation of powers violation inherent in the classification. The importance of the Executive's purpose does not by itself justify a separation of powers violation. Such a theory would create limitless power for the government to disregard all constitutional rights of individuals during a time of war. The protection of American lives and national security is a powerful state interest but it is not a blank check for any action that might potentially further those interests.

The Supreme Court has also determined that a compelling state interest does not remedy separation of powers violations. The *Chadha* Court held that the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution."[157] Responsibility for national security is shared between the President and Congress and each branch must restrain itself to only those powers granted to them by the Constitution. Even with the gravest threat to national security, the President may not take on the powers of Congress to prevent the threat from becoming a reality. Similarly, the President may not take on judicial functions to prevent threats to national security. The compelling nature of the state interest is simply that—a compelling state interest. It cannot be a justification for the violation of other provisions of the Constitution. To allow a compelling state interest to cure constitutional defects would be "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state."[158]

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156. *See* United States v. Salerno, 481 U.S. 739, 750-52 (1987).

157. *Chadha*, 462 U.S. at 944.

158. United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting).

IV. NEITHER STATUTORY NOR CONSTITUTIONAL POWERS GRANT AUTHORITY FOR EXECUTIVE CLASSIFICATION OF INDIVIDUALS CAPTURED OUTSIDE THE BATTLEFIELD

A. The AUMF Does Not Grant Authority

The Executive relies on the authorization of the AUMF as the basis for the classification of enemy combatants. The text of the AUMF states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[159]

Although the Court held in *Hamdi* that the detainment of individuals is necessary and incidental to the statutory powers granted by the AUMF,[160] the analysis cannot extend far enough to cover those detained outside the zone of military activity.

Presidential action has been scrutinized during a time of war before. At the beginning of the twentieth century, the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* emphasized that the President's power to walk outside the boundaries of his inherent power must stem from either the Constitution or an act of Congress.[161] During World War II, President Truman nationalized the steel industry to ensure that steel production necessary for the war efforts would not be interrupted.[162] The steel companies argued that the President's order to the Secretary of Commerce to take control of the mills amounted to lawmaking that was expressly reserved for the Legislative Branch.[163] The Executive argued that the President was acting within his authority as Commander in Chief in a time of war.[164]

The Court ultimately rejected the Executive's argument that the President possessed the inherent power to nationalize the steel mills. Justice Black wrote the opinion of the Court and reasoned that the President's power can only be derived from an act of Congress or the Constitution.[165] No authorization from Congress was apparent because Congress had impliedly rejected the nationalization of industries as resolutions to labor disputes.[166] Thus, authorization had to come from the Constitution. Justice Black held the

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159. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
160. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
161. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).
162. *Id.* at 582-83.
163. *Id.* at 583.
164. *Id.* at 584.
165. *Id.* at 585.
166. *Id.* at 586.

nationalization of steel mills was not an execution of congressional policy.[167] "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[168] Because the presidential order was considered legislative in nature and not authorized by Congress or the Constitution, the order was vacated.

Justice Jackson concurred with the Court's judgment, but he attempted to define a framework in which separation of power issues could be resolved. He set forth three categories that determined the constitutionality of presidential action.[169] First, when the President acts legislatively as a result of an express or implied authorization[170] of Congress, he is at his maximum authority.[171] Second, when the President acts without such authority, a President may only act in a legislative manner when he is authorized to do so by the inherent powers granted to him by the Constitution.[172] However, a problem would be present should the President and Congress hold concurrent power.[173] Third, when the President acts in a legislative manner and that action is contrary to the expressed or implied will of Congress, the President's authority is at its lowest. The only way to defend such an action is to rely on inherent powers granted to the President by the Constitution and argue that such powers are exclusive given the situation.[174] Justice Jackson believed that the President had overstepped his bounds because he acted in direct opposition to the will of Congress and the inherent powers of the Presidency did not warrant such action. He noted that "the Constitution did not contemplate that the title of Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country, its industries and its inhabitants. He has no monopoly of 'war powers,' whatever they are."[175]

Justices Vinson, Reed, and Minton dissented from the majority because they believed that the circumstances justified the President's actions. Justice Vinson argued that the consequences of an interruption of steel production for the war

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167. *Id.* at 588.

168. *Id.*

169. *Id.* at 635-37 (Jackson, J., concurring).

170. The Supreme Court examined implicit congressional authorization in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Justice Rehnquist wrote the opinion for the Court and stated that the lack of a statute granting authorization is not fatal to presidential action. The Court reasoned that Congress cannot specifically authorize all presidential action, especially in the areas of foreign policy and national security. "The enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'" *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

171. *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

172. *Id.* at 637.

173. *Id.*

174. *Id.* at 637-38.

175. *Id.* at 643-44.

effort necessitated drastic action by the President.[176] The dissenting opinion argued that a lack of a statute should not bar action[177] and that the President has wide discretion when executing a "mass of legislation."[178] The Justices argued that the President should not be reduced to an "automaton" that is "impotent to exercise the powers of government at a time when the survival of the Republic itself may be at stake."[179]

Here, the President acted under the guise of a statute, the AUMF, and according to Justice Jackson's three part test in *Youngstown*, the President's power should be at its pinnacle. The *Hamdi* Court agreed and justified the classification of enemy combatants detained on the battlefield as necessary and incidental to the authority granted to the President by the AUMF. Justice O'Connor argued that because detention of enemy combatants is a "fundamental incident of waging war," Congress "clearly and unmistakenably authorized detention" when it granted all powers of "necessary and appropriate force."[180] The Court dismissed the argument that the language of the statute needed to be specific in regards to detention.[181] Such an authorization carries with it the presumption that those captured were necessarily engaged in combat against the United States and would threaten the lives of Americans if released. This presumption is strong for those captured on the battlefield and thus the Court deferred to the determination of the Executive as long as the detainee had adequate opportunity to rebut the presumption.[182] However, this presumption is far weaker when the individual is captured outside the zone of military operations and could fall outside the authority contemplated by Congress when passing the AUMF.

The problem with the *Youngstown* and *Hamdi* analysis lies in the fact that the Court in each analyzed the President's actions as to whether they were legislative in nature. Neither Court entertained the idea that the Executive's action could be judicial in nature. Justice O'Connor justified the Executive's ability to detain enemy combatants while avoiding the analysis of whether the Executive had the authority to *classify* enemy combatants. The Justice continually cited "longstanding law-of-war principles" including preventing captured individuals from "further participation in the war."[183] Yet, these longstanding law-of-war principles justify the Executive's compelling interest in detention, not the classification itself. Even if the AUMF authorizes the Executive to classify individuals captured on the battlefield, nothing within the plain language of the statute authorizes the exercise of judicial powers and the complete circumvention of due process for those captured within the United States.

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176. *Id.* at 668 (Vinson, C.J., dissenting).
177. *Id.*
178. *Id.*
179. *Id.* at 682.
180. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).
181. *Id.*
182. *Id.* at 532-33.
183. *Id.* at 518.

Subsequent action by Congress also indicates that executive classification of enemy combatants was not intended to be authorized by the AUMF. If Congress had contemplated executive classification of enemy combatants under the AUMF, many proposed statutes would have been rendered redundant or inconsistent with that purpose.[184] After passing AUMF, Senators Levin and Feingold asked for clarification from the Executive regarding the exact meaning of the label "enemy combatant" and who was authorized to make such a determination.[185] Representative Schiff proposed legislation specifically authorizing the President to classify enemy combatants.[186] Had such an authorization existed in the AUMF, Representative Schiff's bill and the Senators' requests for clarification would not have been required.[187]

In the weeks following the passage of the AUMF, Attorney General Ashcroft promulgated a "Discussion Draft" that was the precursor to the Patriot Act.[188] The draft included the authorization for the Executive to indefinitely detain any non-citizen that the Executive determined "endanger[ed] the national security of the United States."[189] Congress condemned the provision as an unconstitutional violation of due process rights and a substantial encroachment on civil liberties.[190] Congress is now contemplating the passage of the Detention of Enemy Combatant's Act that would assert congressional authority to limit detention of enemy combatants to a narrow set of circumstances.[191] The move has been viewed as a response to the growing due process concerns that have been raised by detainees.[192] All of these actions indicate Congress never intended for executive classification of enemy combatants.

B. The President's War Powers Do Not Authorize the Classification

The President argues that the Executive's power to classify enemy combatants is inherent in the War Powers conferred by Article II of the

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184. *See* Zadvydas v. Davis, 533 U.S. 678, 697 (2001); *see also* Danielle Tarin, Note, *Will an Attack on America Justify an Attack on Americans?: Congressional and Constitutional Prohibitions on the Executive's Power to Detain U.S. Citizens as Enemy Combatants*, 44 VA. J. INT'L L. 1145, 1169 (2004).

185. Tarin, *supra* note 184, at 1169.

186. *Id.* at 1170.

187. *Id.*

188. Mark Bastian, Note, *The Spectrum of Uncertainty Left by* Zadvydas v. Davis*: Is the Alien Detention Provision of the USA Patriot Act Constitutional?*, 47 N.Y.L. SCH. L. REV. 395, 399 (2003).

189. *Id.*

190. *Id.*

191. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CRS REPORT RL31724, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS 49-50 (2005), *available at* http://www.fas.org/irp/crs/RL31724.pdf.

192. *Id.* at 49.

Constitution.[193] However, the farther away from the battlefield, the weaker the argument becomes that the President possesses the plenary powers to detain the individual.

The Executive argues that the Commander-in-Chief Clause contains an implicit authorization for the classification of enemy combatants during times of crises.[194] The Commander-in-Chief clause gives the President exclusive control of commanding the armed forces, insofar as the use of military force is lawful.[195] However, the President's war powers exercisable in the domestic arena are far more limited because "federal power over external affairs [is] in origin and essential character different from that over internal affairs."[196] Thus, the locus of capture does make a difference when determining the extent and limitations of the exercise of the President's war powers in the domestic arena.

Traditionally, executive decisions exercising the President's Commander-in-Chief powers have been given great deference.[197] In *United States v. Curtiss-Wright Corp.*, the Court upheld a presidential proclamation banning the sale of arms to Bolivia pursuant to the authority granted by the joint resolution.[198] The Court held that the President's power in foreign affairs is not derived from "affirmative grants of the Constitution,"[199] because even if foreign powers were never mentioned in the Constitution, the federal government would still possess the power as a necessary component of a unified nation.[200] The foreign events that the President must respond to are usually complex and necessitate a speedy response.[201] As a result, the President must be afforded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[202] The joint resolution and the subsequent proclamation were upheld as legitimate exercises of foreign affairs powers.[203]

However, the Court did recognize the fundamental differences between presidential powers in the foreign arena and those powers exercised in the domestic arena.[204] "That there are differences between them, and that these differences are fundamental, may not be doubted."[205] Executive decisions made

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193. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

194. *Padilla*, 432 F.3d at 584.

195. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 114 (2002).

196. Padilla v. Rumsfeld, 352 F.3d 695, 713 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

197. *Id.* at 712.

198. United States v. Curtiss-Wright Corp., 299 U.S. 304, 329 (1936).

199. *Id.* at 318.

200. *Id.*

201. *Id.* at 319.

202. *Id.* at 320.

203. *Id.* at 329.

204. *Id.* at 315.

205. *Id.*

regarding activities within the United States are limited by constitutional boundaries.[206] The President cannot order troops to be quartered in private homes during times of peace.[207] The President cannot suspend the writ of habeas corpus for individuals being detained in the United States, including Padilla and al-Marri.[208] The President also cannot unilaterally amend the Uniform Code of Military Justice.[209] Even though all of these actions could fall under a broad interpretation of "commanding the armed forces," all of these actions affect domestic concerns in which Congress has exclusive authority under the Constitution.[210] Thus, the President's war powers are not all-encompassing of military action—some limitations exist.

If executive classification of individuals captured outside of the combat zone were allowed on the war powers theory, it would lead to a result that is directly in conflict with the Court's decision in *Youngstown*. There, the Court rejected the Executive's argument that the Commander-in-Chief power allowed the President to nationalize steel mills in order to prevent an obstruction in the production of steel.[211] The Court recognized that the concept of the "theater of war" was expanding and that broad powers of military leaders were needed, but ultimately held that the Constitution would not allow the confiscation of private domestic property.[212] Thus, the Court restricted the exercise of the President's war powers within the domestic sphere to only actions that would be constitutional otherwise. Executive classifications of individuals captured within the United States would not be constitutional in times of peace. The Due Process Clause and the case law regarding preventative detention would necessarily prevent the detention of individuals without a judicial hearing.

Executive classification of individuals within the United States would also set precedent for further action by the Executive that would otherwise be unconstitutional but could potentially be justified under the war powers theory. If the only link that had to be made was that the action in some way secured national security, the President would be able to nationalize industries that potentially threaten the supplies for the military engaged in fighting the war on terror. Such an action would be parallel to President Truman's action in *Youngstown*—an action that was specifically found not to be a valid exercise of the President's war powers. Thus, the presidential war powers should not extend to the classification of individuals captured within the United States.

The Supreme Court has yet to determine if executive classification of

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206. Padilla v. Rumsfeld, 352 F.3d 695, 712-13 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

207. *See* U.S. CONST. amend. III; *see also Padilla*, 352 F.3d at 714-15.

208. *See* U.S. CONST. art. I, § 9, cl. 2; *see also Padilla*, 352 F.3d at 714.

209. *See* U.S. CONST. art. I, § 8, cl. 14.

210. *See Padilla*, 352 F.3d at 714-15; *see also* Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices Are Aroused,"* 2 SEATTLE J. FOR SOC. JUST. 129 (2003).

211. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

212. *Id.* at 587.

individuals captured outside the zone of active military operations is authorized within the war powers granted to the President by the Constitution. However, an analysis of those powers indicates that they do not authorize the exercise of executive authority over those detained outside the zone of active military operations.

V. POLICY IMPLICATIONS OF AN EXECUTIVE CLASSIFICATION

The classification of enemy combatants balances two competing interests: the interest of national security versus the interest of individual liberty.[213] Both are extremely important and a proper balance must be struck. This proper balance is best left to the judiciary as it has traditionally been done in the civil criminal preventative detention arena.

The Executive Branch thus far has focused entirely on the interests of national security at the expense of individual liberty interests. The Executive's argument that it retains the unreviewable right to detain individuals labeled as enemy combatants[214] and other controversial exercises of power illustrates the bias. The Executive Branch will strike an improper balance in favor of national security interests because it is highly unlikely that the violations of any individual liberties will affect the people who put the Executive in office. The minority who are the most burdened by the executive classification are not likely to be avid supporters of the Executive anyway. The Executive Branch is a political branch and therefore takes into consideration those issues that most concern its constituency. However, the Constitution does not allow the trampling of the individual rights of the few to satiate the many.[215]

The Executive Branch investigated and captured the individual—its opinion as to the status of the individual is necessarily biased. The Executive Branch has an interest in classifying these individuals as enemy combatants that does not stem from national security—the appearance of action against "terrorists" scores political points for the Executive. The Judicial Branch is more equipped to make the balancing determination. It is apolitical and thus does not bend to the will of the majority and has no need to create an appearance of action. The Judiciary is in a more neutral place to determine the status of the individual. This neutrality was the intent of the Framers and should be preserved in this instance.

Executive classifications also allow the Executive to circumvent judicial review altogether. The Supreme Court has already ruled that a post-classification review of a detainee's status is available.[216] However, this review can be avoided by the Executive because the Executive controls the application of the enemy combatant label. Recently in *Padilla v. Hanft*, the Fourth Circuit held that an American citizen captured on American soil may be held indefinitely as an

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213. Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004).

214. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); al-Marri v. Hanft, 378 F. Supp. 2d 673, 676 (D.S.C. 2005).

215. *See* INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

216. Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004).

enemy combatant.[217] Padilla applied for certiorari with the Supreme Court,[218] where justices had previously indicated that they were wary of the constitutionality of the Executive's action.[219] To avoid review by an unfavorable court, Padilla was charged with criminal charges in Florida, asserting facts far less severe than those the Executive put forth to the Fourth Circuit for justification of Padilla's detention.[220] Padilla was de-classified and the Florida prosecutor sought the transfer of Padilla to Florida for criminal charges, while the Executive retained the right to re-classify him as an enemy combatant in the future.[221]

This scenario would be avoided altogether with a judicial classification of enemy combatants and highlights the problem with post-classification judicial review. Post-classification judicial review does not protect against the liberty violations of the innocent. This is especially true given the deferential standard of review the courts have been utilized when enemy combatants challenge their status.[222] If the courts continue to refuse to scrutinize the Executive's decision post-classification, then no check exists against executive power and the separation of powers doctrine demands that a pre-classification judicial review take place.

Current infringements on judicial power may lead to future infringements. The United States may have already seen the beginnings of future encroachments by the Executive. Citing the AUMF as authority, the President has recently revealed a domestic wire-tapping program that has questionable constitutional basis.[223] The revelation is the inevitable consequence of a violation of the separation of power. Once a branch has usurped authority and made a power grab that is essentially condoned by the other two branches, the temptation to grab at more power is that much more appealing. It encourages the Executive to test the boundaries of its powers rather than requiring the Branch to exercise restraint. The acquiescence to violations of separation of powers creates a slippery slope that allows future violations to go unchecked.

Executive classification and the Executive's argument against judicial review potentially creates devastating credibility issues with the courts. With the most recent debacle in the *Padilla* case, the Fourth Circuit noted that the Executive's credibility with the courts has been seriously questioned.[224] The court also emphasized the obvious implication that an opportunistic Executive left with the courts. "[I]ts actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we

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217. *See* Padilla v. Hanft, 423 F.3d 386, 397 (2005).

218. *See* Padilla v. Hanft, 432 F.3d 582, 584 (2005).

219. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (Stevens, J., dissenting).

220. *Padilla*, 432 F.3d at 584.

221. *Id.*

222. *See* Cruz, *supra* note 210, at 145-48.

223. Risen & Lichtblau, *supra* note 2.

224. Padilla v. Hanft, 432 F.3d 582, 587 (2005) ("[T]he government's credibility before the courts in litigation ancillary to that war, [has] been carefully considered.").

would have though the government could ill afford to leave extant."[225] The Executive's constant assertion that the classification of enemy combatants should be unreviewable by the courts coupled with the blatant attempt to avoid such review creates an atmosphere of distrust and the courts may be more prone to meticulously scrutinize the power the Executive has under the AUMF.

CONCLUSION

It is essential that a neutral third party determine the status of individuals detained outside the combat zone. The burden of proof should remain on the Executive to convince the third party of the threat the individual poses to the United States. How high the burden of proof should be is still being debated.[226] Regardless of the burden of proof the Executive must meet, the key lies in a neutral determination of the classification.

Congress did empower the President to take necessary action against those suspected of ties to the September 11 attacks and to future terrorist plots. However, the President has used this authorization to exercise power never contemplated by the AUMF. It is important to remember that the tyrannical exercise of power by the Executive can only hurt the innocent. The judicial classification of enemy combatants does not protect those who are involved in terrorist activities—they will be classified as enemy combatants under either scheme of power. The judicial classification protects those who are accused of terrorist ties but who in fact are innocent of all such activity. It prevents the Executive from engaging in a McCarthy-like crusade against individuals miles away from the zone of combat. It avoids the Korematsu-like detention of individuals based on their race but having no connections with terrorist cells. It is the protection of the liberty that the war on terror is seeking to preserve. District Court Judge Doumar reminds everyone of the purpose of retaining the integrity the separation of powers doctrine: "We must protect the freedoms of even those who hate us, and that we may find objectionable. . . . We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws."[227]

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225. *Id.*

226. For a discussion of the different standards of review and their supporters, see generally Cruz, *supra* note 210.

227. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 536 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).